

HJR 10 Compliance and Enforcement  
Study  
Technical Appendix

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## **The Montana Environmental Quality Council**

The Montana Environmental Quality Council (EQC) was created in 1971 to help state agencies, the legislature, and all Montanans define and achieve “productive harmony between humans and the environment.” The Montana Environmental Policy Act sets out the statutory duties of the EQC, among them:

- gathering and providing general information on the state’s natural resource conditions and trends,
- helping state agencies understand and implement the Montana Environmental Policy Act (MEPA),
- assisting legislators and others in interpreting and updating natural resource laws, and
- **designing and completing specific studies on current and future resource issues in Montana.**

The Environmental Quality Council is bipartisan, meets 4-6 times a year, and has 17 members, including 6 state senators, 6 state representatives, 4 members of the general public and the governor’s representative.





## **Environmental Quality Council Members**

**House Members:** Representative Bill Ryan, Representative Scott Orr, Representative Dick Knox, Representative Bill Tash, Representative Vicki Cocchiarella, Representative Debbie Shea

**Public Members:** Gregory Tollefson, Jerry Noble, Jeanne-Marie Souvigney, Jerry Sorensen

**Senate Members:** Senator William Crismore, Senator Lorents Grosfield, Senator Ken Mesaros, Senator Vivian Brooke, Senator Jeff Weldon, Senator Steve Doherty

**Governor's Representative:** Glenn Marx

**EQC Staff:** Todd Everts, Legislative Environmental Analyst, Martha Colhoun, Resource Policy Analyst, Larry Mitchell, Resource Policy Analyst, Kathleen Williams, Resource Policy Analyst, Maureen Theisen, Research Assistant



## PLEASE NOTE

During the 1995 Session, the legislature approved a significant reorganization of the state's natural resource agencies. As a result, division and program structures and names as well as job titles and responsibilities have changed since the initiation of this study. In order to maintain consistency throughout this document, the EQC has continued to speak of the programs as if they still existed in their original form.

Throughout the study process, the Council and staff made a point to carefully document the information provided, the issues raised, program staff responses to issues, further research done at the request of the Council, panel presentations, and general discussions. This Appendix is the compilation of what the Council and staff felt would be most useful to others and have the longest "life." Additional information from the study, however, is referenced in various sections of this Appendix and is available by request from EQC staff.

At the time that this Appendix was going to press, the EQC had requested House Bill 132, which requires the Department of Environmental Quality, the Department of Agriculture, and the Department of Natural Resources and Conservation to report certain compliance and enforcement activities to the EQC. A copy of the bill is included as Appendix C.

If you are interested in the findings and recommendations resulting from this study, see the EQC publication, the *HJR 10 Final Report to the 55th Legislature*.



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## GLOSSARY OF ACRONYMS

EQC staff attempted to minimize the use of acronyms in this document. However, due to space limitations and repetition in the program summaries, they do appear. Each acronym is explained and spelled out in the text of the relevant section. The following list is provided for the reader who may read excerpts of the text which may not include the explanation.

AO	Administrative Order
ARM	Administrative Rules of Montana
BER	Board of Environmental Review
BLM	United States Bureau of Land Management
BMP	Best Management Practices
BWWC	Board of Water Well Contractors
CAFO	Confined Animal Feed Operation
CERCLA	federal Comprehensive Environmental Response, Compensation and Liability Act
CECRA	state Comprehensive Environmental Cleanup and Responsibility Act
CMVG	County Motor Vehicle Graveyard
CY	Calendar Year (January 1-December 31)
DEQ	Montana Department of Environmental Quality
DFWP	Montana Department of Fish, Wildlife and Parks
DHES	Montana Department of Health and Environmental Sciences (currently the DEQ)
DNRC	Montana Department of Natural Resources and Conservation
EA	Environmental Assessment
EQC	Environmental Quality Council
EIS	Environmental Impact Statement
EPA	federal Environmental Protection Agency
FTE	Full Time Equivalent (Employee)
FFY	Federal Fiscal Year (October 1-September 30)
FY	state Fiscal Year (July 1-June 30)
HRA	Hazard Reduction Agreement
LUST	federal Leaking Underground Storage Tank Trust fund
MDA	Montana Department of Agriculture
MCA	Montana Codes Annotated (state statutes)
MAPA	Montana Administrative Procedures Act
MDOT	Montana Department of Transportation
MEPA	Montana Environmental Policy Act
MGWPCS	Montana Ground Water Pollution Control System
MMRA	state Metal Mines Reclamation Act
MOA	Memorandum of Agreement (an official working agreement between agencies)
MOU	Memorandum of Understanding (similar to a MOA)
MPDES	Montana Pollutant Discharge Elimination System
MSUMRA	Montana Strip and Underground Mine Reclamation Act
MVRD	Motor Vehicle Recycling and Disposal
MVWF	Motor Vehicle Wrecking Facility
NFIP	National Flood Insurance Program
NPL	National Priority List

NON	Notice of Noncompliance
NOV	Notice of Violation
NRIS	Natural Resource Information System
NSNC	Nonsignificant Noncomplier
OSM	federal Office of Surface Mining
PRP	Potentially Responsible Party/Person
PTRCF	Petroleum Tank Release Compensation Fund/Board (Petro-Fund/Petro-Board)
PWSA	Public Water Supply Act
RCRA	federal Resource Conservation and Recovery Act
RI	Remedial Investigation
RIT	state Resource Indemnity Trust fund
RIGWAT	state Resource Indemnity/Ground Water Assessment Trust fund (was RIT)
SMCRA	federal Surface Mine Control and Reclamation Act
SME	Small Miner Exemption
SMZ	Streamside Management Zone
SNC	Significant Noncomplier
UIC	Underground Injection Control
USFS	United States Forest Service
UST	Underground Storage Tank



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# SECTION 1: INTRODUCTION

Since 1993, members of the Environmental Quality Council (EQC) have heard various concerns over state agency enforcement of environmental regulations. Specific issues raised included concerns over the ability of the state to oversee proposed hazardous waste incineration, lack of or inconsistent enforcement of water quality violations, and inequity in air quality regulation.

The Council took a closer look at water quality enforcement during a 1993-94 water quality study, and devoted two meetings in 1994 to further discuss environmental compliance programs.

Based on the scope and complexity of the issues, the EQC recommended a comprehensive study of all state natural resource agencies. The 1995 Legislature agreed, passing House Joint Resolution (HJR) 10 in March 1995.

HJR 10 (see Appendix A) directs the Environmental Quality Council to review and analyze the state's enforcement and compliance framework and how it is implemented, including these factors:

- the proper balance among enforcement tools (i.e. education, penalties, etc.) in an effective and efficient enforcement program,
- other states' attempts to measure and improve compliance, and
- whether Montana's natural resource goals are consistent and appropriate and if they are being met.

The findings and recommendations of the EQC are described in the *HJR 10 Final Report* (a separate document). This *Technical Appendix* includes background materials on the process used, programs reviewed, what the Council heard from the programs and how the programs were evaluated, and other background information the Council felt might be useful to others interested in how the state's environmental and natural resources compliance and enforcement programs operate.

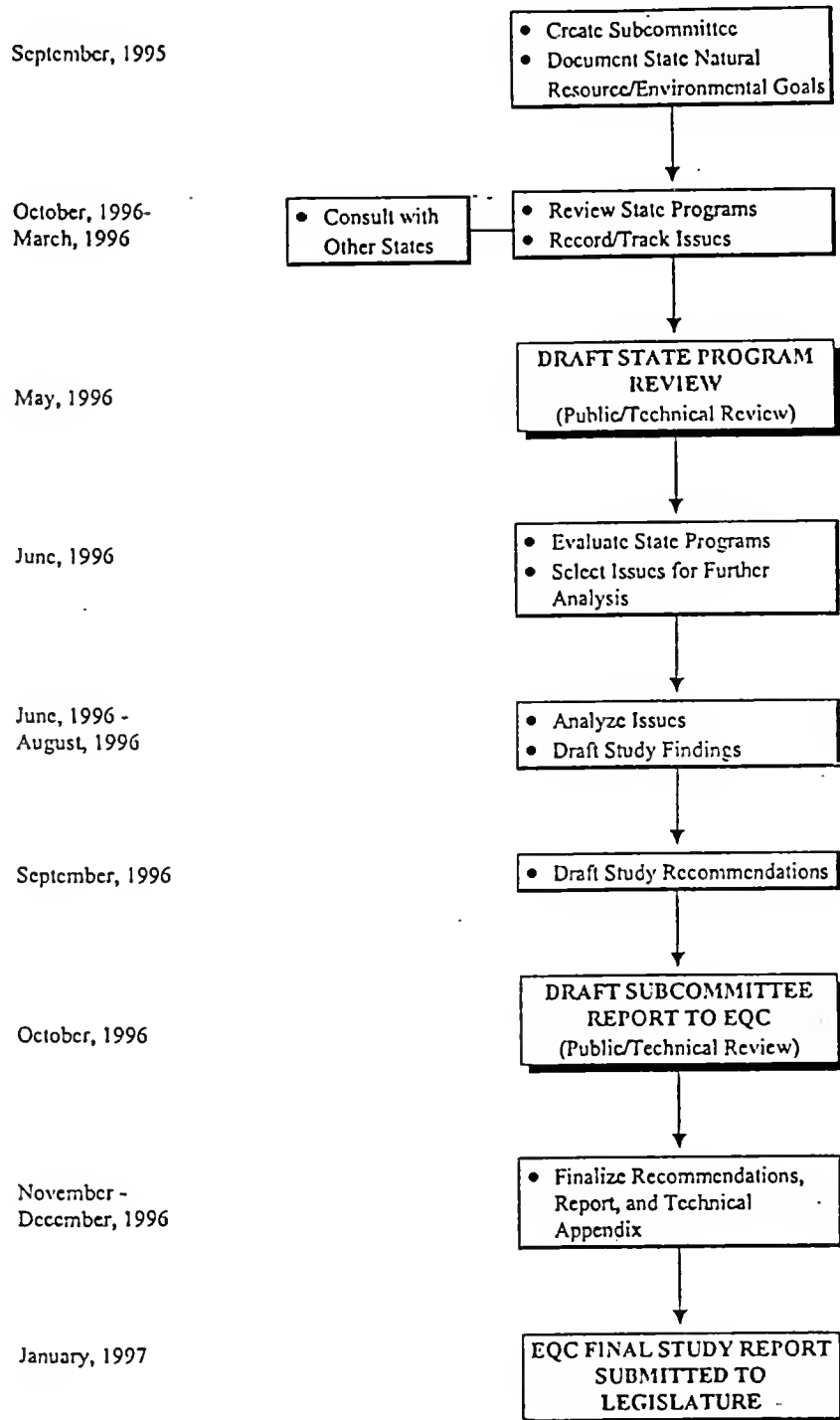
## STUDY PROCESS

HJR 10 required the EQC to submit its compliance and enforcement findings and recommendations to the next legislature, which convenes in January 1997. The process and time line for the study is illustrated on the next page, and described below.

### Subcommittee Creation

In September 1995, after considering its interim responsibilities and available resources, the Council decided to create a Compliance and Enforcement Study Subcommittee to address HJR 10 in depth. The subcommittee was composed of ten EQC members representing a diverse constituency, both geographically and philosophically. Members included Representative Dick Knox, Chair; Representative Vicki Cocchiarella, Vice-chair; Senator Lorents Grosfield; Representative Debbie Shea; Senator Steve Doherty; Senator William Crismore; Representative Scott Orr; Mr. Greg Tollefson; Mr. Jerry Sorenson; and Ms. Jeanne-Marie Souvigney. Between October 1995 and December 1996, the subcommittee met in Helena approximately each month, sometimes for two days, to hear and discuss topics relevant to the study.

## HJR10 STUDY PROCESS



## State Program Review

The Council's most resource-intensive task was reviewing the enforcement component of each natural resource and environmental program. The EQC looked closely at 28 state programs chosen for intensive review based on objective criteria, i.e., the existence of statutory enforcement authority and a distinct regulated community. However, recognizing both staff and Council resource restrictions, some programs that met the base objective criteria were not selected for further review. More information regarding program selection is found in Section 2.

EQC staff sent each program identified for review a four-page list of written questions and a suggested presentation outline. Program personnel then appeared before the Council to present their information and answer questions. Additionally, the EQC invited representatives from relevant public interest organizations and members of the regulated communities to respond to the program presentations, to voice their concerns and opinions, and to comment on the study in general.

The EQC staff documented all issues raised in testimony by the Council or by staff and presented them in the *Draft State Program Review* sent out for public comment. Some program staff provided responses to some of these issues. The list of issues, with attached program comments, is available from the EQC staff.

## Consultation with other States

One of the 1995 Legislature's requests of the Environmental Quality Council set forth in HJR 10 was that the study include an analysis of other states' natural resource and environmental agencies' attempts to improve and measure compliance and enforcement.

The Council adopted the following goal regarding this request:

*Identify the methods other states use to improve and measure compliance and enforcement with their state natural resource and environmental laws.*

The EQC staff contacted 13 other states in the Montana region and elsewhere to gather information, focussing on those states using a "benchmark" approach to measuring compliance. Typically, the staff contacted environmental quality agency director's offices and held discussions with directors or their policy advisors.

The staff also contacted nationwide groups such as the Environmental Council of States, National Association of Attorneys General, Environmental Law Institute, Council of State Governments, National Council of State Legislatures, Conference of Western Attorneys General, Florida Center for Public Management, and the federal Environmental Protection Agency.

The EQC staff made a presentation to the Council in January 1996 summarizing research on this item. A detailed discussion of the results of this research is included in Section 3. A brief synopsis follows.

A search for a universal "thermometer" or yardstick proved fruitless. Each state had grappled with the same issues that confront Montana in evaluating natural resource and environmental programs. The

difficulty was especially obvious when measuring program efforts and then attempting to relate those efforts to resource or environmental quality.

The parameters commonly used as yardsticks for measuring compliance and enforcement results include:

- environmental results,
- compliance rates,
- progress in returning significant violators to compliance,
- measures of compliance monitoring,
- number of enforcement responses,
- timeliness of enforcement responses,
- monetary penalties assessed, and
- measures of technical assistance.

## **Draft State Program Review**

The Council circulated a draft version of this *Technical Appendix*, entitled the *Draft State Program Review*, to the public and agency staff for review and comment. The draft, summarizing the Council's efforts to May 1996, included the following sections.

- Background Information on the Study and Study Process
- 28 State Program Reviews
- Other State Compliance and Enforcement Review Activities
- Federal/Montana Oversight Relationships
- Program Evaluation Criteria
- Potential Compliance and Enforcement Issues and Opportunities
- State Environmental Constitutional and Statutory Goals

The *Draft State Program Review* was more than 400 pages long, with the bulk of the document composed of the individual state program reviews. The Council requested that this document be distributed to interested persons for comment. Reviewers were asked to help determine whether the Council needed any additional information and to assist in the selection of issues for further analysis and review. Specifically, the Council asked the following.

- Is the information presented complete? What additional information, if any, should the Council review?
- Are the preliminary issues and opportunities identified appropriate?
- Which of the preliminary issues or opportunities identified are most important?
- Are there any other issues or opportunities that have not been identified that should be listed?
- Any suggestions or recommendations on how to address any of the preliminary issues or opportunities that have been identified?
- Are there additional uses for the information that has been generated, other than the HJR 10 study process?

The EQC received 17 sets of comments on the draft. EQC staff summarized the comments and presented them at the June subcommittee meeting.

## Program Evaluation

Using the information provided in the program summaries and the evaluation forms included with this document (see Section 5), the Council completed its program evaluations, using the following five conceptual criteria.

Timeliness -- *Happening or done at an appropriate time, especially at such a time as to be of help or service.*

Equity -- *Fairness; impartiality; justice.*

Consistency -- *Agreement with what has already been done or expressed; conformity with previous practice.*

Effectiveness -- *Having an effect; producing a result. Active, not merely potential or theoretical.*

Efficiency -- *Ability to produce a desired effect, product, etc., with a minimum of effort, expense, or waste.*

Additionally, the program summaries were designed to allow the Council to make an evaluation regarding the overall appropriateness of a specific program, including appropriateness . . .

By program -- *Has the program achieved a proper balance among enforcement tools to create an effective and efficient compliance program?*

Across programs -- *Are the approaches this program uses appropriately consistent with other agencies/programs, considering relative risk to public health and the environment?*

By statutory goal -- *Is the program meeting relevant statutory goals? Are the goals appropriate?*

Council members discussed the option of submitting their evaluation forms to the EQC staff for compilation. They also discussed whether they wanted their conclusions expressed by program or generally and whether to express those conclusions in numerical terms. Though the opinions of Council members varied, as a whole they concluded that each member would use their evaluation sheets as their own personal note-taking and evaluation tool and their conclusions would be expressed by criterion (rather than by program) and would not be quantitative. They did not feel it was their role in this study to rate individual programs.

## Issue Selection

The Council identified areas where they needed additional information in order to begin drafting their findings and recommendations. The questions asked included:

- A. What programs would be appropriate for the use of voluntary BMPs as an enforcement tool?
- B. What state functions (in compliance and enforcement) are candidates for privatization (including contract work)?
  - What's private now? What were the criteria? Is it a success? What was the cost?
  - Check into the Governor's office efforts related to privatization;
  - Where are program personnel being lost to privatization?
- C. How can staff retention, where identified as a problem, be improved?
  - Why is there a problem?
  - What can be done?

- D. What are the suggestions for improving federal/state primacy relationships? (Consult with state agencies and representatives of regulated communities.)
- E. Does each agency have formal, written compliance and enforcement policy and procedures, including:
  - a. education, technical assistance and public outreach components;  
- (for each component above) if not, is one needed?; if yes, is it adequate?
  - b. clear, consistent and appropriate incentives for compliance and penalties for noncompliance;
  - c. a compliance monitoring program, using measurable parameters, and based upon statutory goals; and
  - d. a procedure for comprehensive and retrievable record-keeping and tracking?
- F. How might an annual update to this study best be provided? What parameters should be included to ensure the update is useable?
- G. Review the “History of Compliance” and “History of Resolution” sections (of the *Draft State Program Review*) to see if there are holes that can be filled.
- H. For each program, in light of its statutory goal, how does the program measure success? (i.e. condition of the resource, number of violations, etc.)
- I. Do programs have enough staff?
- J. What are the impacts of reorganization on identified issues and how can those impacts be evaluated in the future (i.e. next biennium)?
- K. Is the initial interaction with a violator appropriately flexible and understanding of the conditions of the violator?

## Research Issues

EQC staff pursued a number of answers to these questions over the next two months and presented the results at the August subcommittee meeting. This information is available on request.

## Development of Findings and Recommendations

Based on their review of programs, issues raised, comments received, and spirited discussions, the Council submitted their individual findings (conclusions) and recommendations to the EQC staff in September. EQC staff condensed these ideas into a draft document, which was then discussed among the group, converting individual conclusions into group recommendations.

The Council strove for collective agreement in their decision making process. Members were asked at each decision point if they could “live with” the statement being discussed. If not, they were asked to suggest a change that would enable them to accept the statement. If such a change could not be accommodated, the option existed for documenting the disagreement. The process worked well, and there was no point where a “minority opinion” was necessary. The Council findings and recommendations are presented in the *HJR 10 Final Report to the 55th Legislature*, available from the EQC office.



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## SECTION 2: REVIEW OF STATE PROGRAMS

### Selecting Programs for Review

HJR 10 directs the EQC to review Montana's "natural resource and environmental compliance and enforcement" framework. This is defined as state programs that meet the following criteria:

- A state agency has jurisdiction over the achievement of specific natural resource and environmental constitutional and/or statutory goals, and
- There is one or more identifiable "regulated communities" the agency coordinates with to achieve the above goals. These communities include private, corporate, or local government entities. Programs that wholly involve state actions are not included. Some programs may only employ "compliance" tools, not the full spectrum of enforcement tools.

There were several steps in selecting the agencies and programs to include in this study.

Those agencies responding to the 1994 Compliance and Enforcement Questionnaire (EQC, 1994) were automatically included. The EQC staff also reviewed Montana's statutes for natural resource and environmental goals, matching state agency jurisdiction with those goals. At the same time, we reviewed the post-reorganization list of state agencies and programs included in the Legislative

Fiscal Report (see Attachment), to ensure our list was up-to-date and complete. Relevant portions of the list were then reviewed with agency representatives when setting up program presentations, and changes were made where necessary to ensure adequate coverage of agency compliance programs.

The figure above lists the primary state agencies in Montana. Those noted in bold are involved in natural resource or environmental compliance.

The following pages comprise a review of Montana's environmental and natural resource compliance and enforcement programs, by agency. Information is based primarily on materials presented to EQC members and staff during Step 2 of the study process.

### MONTANA'S STATE AGENCIES

Board of Public Education  
Bureau of Mines and Geology  
Commissioner of Political Practices  
Community College Assistance Program  
Department of Administration  
**Department of Agriculture**  
Department of Commerce  
Department of Corrections  
**Department of Environmental Quality**  
**Department of Fish Wildlife and Parks**  
Department of Justice  
Department of Labor and Industry  
Department of Livestock  
Department of Military Affairs  
**Department of Natural Resources and Conservation**  
Department of Public Service Regulation  
Department of Revenue  
Department of Transportation  
Fire Services Training School  
Governor's Office  
Judiciary  
Legislative Branch  
Library Commission  
Montana Agricultural Experiment Station  
Montana Arts Council  
Montana Chiropractic Legal Panel  
Montana Extension Service  
Montana Forest and Conservation Experiment Station  
Montana Historical Society  
Montana University System  
Office of Public Instruction  
Office of the Secretary of State  
Public Health and Human Services  
State Auditor's Office  
Vocational Education Council

Note: Agencies noted in **bold type** contain one or more programs included in this study.

Sources: LFA, 1995; EQC Staff, 1995.

# MONTANA DEPARTMENT OF AGRICULTURE

The Department of Agriculture was established to encourage and promote the interests of agricultural and allied industries in Montana. It collects and publishes agricultural production and marketing statistics relating to agricultural products; assists, encourages and promotes the organization of farmers' institutes, agricultural societies, fairs, and other exhibitions of agriculture; adopts standards for grade and other classifications of farm products; coordinates in devising and maintaining economical and efficient marketing distribution systems; gathers and distributes marketing information concerning supply, demand, price, and movement of farm products; regulates production and marketing of food and fiber products; and registers pesticides and fertilizers and enforces laws pertaining to them.

The activity mentioned last, pesticide and fertilizer regulation, is considered to be a "regulatory" program. This program is housed in the Agricultural Sciences Division, noted in bold in the table below.

<u>Bureau/Division</u>	<u>Budget</u>		<u>Staff (FTEs)</u>	
	<u>FY 96</u>	<u>% of Total</u>	<u>FY 96</u>	<u>% of Total</u>
Central Management	\$546,000	6.4%	11.5	10.6%
<b>Agricultural Sciences</b>	<b>4,421,000</b>	<b>51.7</b>	<b>52.5</b>	<b>48.4</b>
Agricultural Development	<u>3,589,000</u>	<u>41.9</u>	<u>44.5</u>	<u>41.0</u>
TOTAL	\$8,556,000	100.0%	108.5	100.0%

source: LFA, 1995.

## AGRICULTURAL SCIENCES DIVISION

This division is one of three currently organized in the Montana Department of Agriculture. The others are the Central Management Division, which manages administrative and legal matters, and the Agricultural Development Division, which has responsibilities for commodity promotion, analysis and inspection, agricultural market development and financing, and others. Programs within these other two divisions were not identified by the agency as being relevant to the Compliance and Enforcement Study.

The Agricultural Sciences Division administers, manages, coordinates, and evaluates the major activities of: 1) pesticide and pest management, 2) analytical laboratory services, 3) noxious weed management, 4) agricultural chemical ground water management, and 5) vertebrate pest management. This division administers the Montana Pesticides Act, Agricultural Chemical Ground Water Protection Act, Crop Insect Detection Act, Commercial Feed Act, Commercial Fertilizer Act, Vertebrate Pest Management Act, Noxious Weed Trust Fund Act, and the Weed Assistance Act. The division administers agricultural programs relating to the production, manufacturing, and marketing of commodities exported from or distributed in the state. The Montana Department of Agriculture has identified two of its programs, the Pesticides Program and the Agricultural Chemical Ground Water Protection Program as being subject to review under the criteria established by the EQC for the compliance and enforcement study. FY 96 budget, staffing, and funding source information for all programs in the Agricultural Sciences Division is provided on the following page.

<u>FY 96 Budget</u>		<u>FTE</u>	<u>FY 96 Funding Sources</u>	
Personal Services	\$1,604,400	52.5	General Fund	\$ 106,890
Operating Expenses	\$1,012,100		State/Other Special	\$3,758,700
Equipment	\$ 216,900		Federal Special	\$ 555,054
Grants	\$1,587,300		Proprietary	0.00
Benefits and Claims	<u>0.00</u>	<u>    </u>		<u>            </u>
TOTAL	\$4,420,700	52.5		\$4,420,668

LEPO staff did not attempt comparisons between FY 90 and FY 96 figures. During the time interval, a significant reorganization of programs between divisions and a consolidation of divisions made comparisons difficult.

## Legislative History

Events important to the pesticide and ground water compliance/enforcement elements of the Agricultural Sciences Division are summarized below.

- 1947 Montana Insecticide, Fungicide and Rodenticide act (Pesticide Product Registration act).
- 1971 Montana Pesticides act, enacted.  
Major amendments to Montana Pesticides Act; permitted licensing of applicators and dealers, other significant changes.
- 1983 State Pesticide Management Account established..fees for program support.
- 1989 Montana Agricultural Chemical Ground Water Protection Act enacted.
- 1993 Pesticide Act amendments established temporary waste pesticide and container recycling and disposal and amended penalties.

# Pesticides Program

Montana's constitution requires the Montana Department of Agriculture (MDA) to protect, enhance and develop all agriculture in the state. The constitution also provides for the maintenance and improvement of a clean and healthy environment for present and future generations.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Pesticides Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. XII, Sec. 1** provides for a Department of Agriculture and laws and appropriations to protect, enhance, and develop all agriculture. Sec. 2 provides that special levies may be made on livestock and on agricultural commodities for disease control and indemnification...inspection, protection, research and promotion. Revenue derived can be used only for the specified purposes. Art. IX, Sec. 1 provides for the maintenance and improvement of a clean and healthful environment for present and future generations.
- **Montana Pesticides Act (MCA 80-8-101, et. seq.)** provides for the use and control of necessary pesticides.

Supplemental and/or related state authorities:

- **Montana Agricultural Chemical Ground Water Protection Act (MCA 80-15-101 et. seq.)**
- **The Montana Environmental Policy Act (MCA 75-1-101, et. seq.)**
- **Water Quality Act of Montana (MCA 75-5-101, et. seq.)**
- **Clean Air Act of Montana (MCA 75-2-101, et. seq.)**
- **Montana Hazardous Waste Act (MCA 75-10-401, et. seq.)**

Related federal authorities:

- **Federal Insecticide, Fungicide, Rodenticide Act (FIFRA)**
- **National Environmental Policy Act (NEPA)**
- **Federal Endangered Species Act (ESA)**

Administrative rules:

- ARM 4.10.101-1008, ARM 4.10.1201-1208, ARM 4.10.1401-1808.

Specific enforcement authority:

- MCA 80-8-104, MCA 80-8-105, MCA 80-8-110, MCA 80-8-211, MCA 80-8-302, 303, 304, 305, and specifically MCA 80-8-302 through 306.
- ARM 4.10.1001-1006
- FIFRA (allows states to be granted primary responsibility for enforcement)

Primacy and jurisdictional agreements

- a) primacy from EPA for Pesticides Act
- b) Memorandum of Understandings with
  1. Montana Dept Env Quality
  2. U.S. Dept of Defense
  3. U.S. Dept of Agriculture

**2. Program Goals.** Based on the above-referenced guidance, the Pesticides Program has identified the following program goals:

1. Ensure compliance with the Montana Pesticides Act.
2. Ensure that pesticides are sold and used by trained, qualified, licensed/certified persons.
3. Continue to develop programs on worker protection, endangered species, and the disposal of pesticides and pesticide containers.
4. Provide training and assistance to farmers, ranchers, and the general public on methods for controlling insects, weeds, and rodents.
5. Implement integrated pest management in Montana schools to minimize the effects on human health, the environment and nontarget organisms.
6. Develop cooperative agreements with Montana Indian tribes.
7. Provide reliable, dependable, economical, and timely analytical data.

**3. Program Activities.** In general, the Pesticides Program implements the requirements of the Montana Pesticides Act and administers provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in the state. All pesticides, federally approved for sale, must be registered with the Montana Department of Agriculture prior to their use in Montana. Applicators of pesticides which are designated by the federal Environmental Protection Agency (EPA) and the MDA as "restricted pesticides" instead of "general pesticides", must be licensed as certified applicators by the program. Commercial and government applicators of pesticides must be licensed by the state program. Pesticide dealers (as defined) must also be licensed by the state. The Pesticides Program provides training, technical advice and certification for pesticide use and application. A waste pesticide and used pesticide container collection, cleaning and recycling program is being administered by the department temporarily until 1999. These activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retn.</u>	<u>FY 96 Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of proj./yr</u>
Administration N.A.	\$ 68,098	1.61		N.A.	N.A.	
Field Services Bureau	273,873	6.34	5.2	Routine Inspections	N.A.	690
				Investigations	N.A.	57
				Samples	N.A.	190
Technical Services Bureau	637,761	5.95		Pesticide Registrations	N.A.	4,915
				Pesticide Licenses	N.A.	4,560
				Pesticide Education	N.A.	1,500
Laboratory Bureau	<u>292,227</u>	5.21		Pesticide Analyses	N.A.	1,772
				Analytical	N.A.	2
				Method-Development		
<b>TOTALS</b>	<b>\$1,271,999</b>	<b>19.11</b>				

\* Does not include support received from Central Management Division for personnel and legal services

Of the 19.11 FTEs in the Pesticides Program, 6.34 FTEs are assigned to program field enforcement and compliance activities. The department has field offices in Billings, Bozeman, Glasgow, Great Falls, and Missoula. Support offices are in Helena and the analytical laboratory is in Bozeman. This assignment of FTEs and functional activities is shown in the following two tables.

<u>Office Locations</u>	<u>FY 96 FTEs</u>
Helena	10.56
Bozeman (Field Services Bureau)	0.66
(Laboratory Bureau)	5.21
Billings	0.34
Glasgow	1.00
Missoula	0.34
Great Falls	1.00
<b>Total</b>	<b>19.11</b>

<u>Functional activities</u>	<u>Approximate Annual Workload</u>
Pesticide dealer licensing	475
Pesticide applicator licensing (commercial, government, and noncommercial)	2,967
Farm applicator permitting	2,167

<u>Functional activities (cont.)</u>	<u>Approximate Annual Workload</u>
Inspections	630
Compliance Assistance	40
Complaint investigations	57
Sample Collection	190
Pesticide Registrations	5904
Emergency and Special Local Need Registrations	15
Training Manuals Revised or Written	2
Applicators Trained/Courses	1500/60
Pesticide Waste Collection	15,000 lbs
Surveys, Training and Demonstrations	2,000
Pesticide Analyses	1,772
Pesticide Analytical Method Development	2

<u>Pesticides Program Revenue</u>	<u>Budget</u>			
	<u>FY 96</u>	<u>FY 97</u>	<u>Total</u>	<u>% of Total</u>
<b>FTE</b>	<b>19.11</b>	<b>19.11</b>	<b>19.11</b>	
	\$ 15,917	\$ 16,138	\$ 32,055	1.2
<b>General Fund</b>	\$ 773,920	\$ 769,346	\$ 1,543,266	59.5
	\$ 5,000	\$ 5,000	\$ 10,000	0.4
<b>Pesticide Account</b>	\$ 9,402	\$ 9,402	\$ 18,804	0.7
<b>Pesticide manuals</b>	<u>\$ 467,720</u>	<u>\$ 522,986</u>	<u>\$ 990,706</u>	<u>38.2</u>
<b>Pesticide training EPA</b>				
<b>Agreements</b>	\$1,271,959	\$1,322,872	\$2,594,831	100%
<b>TOTAL</b>				

**Fees and Charges.** The Pesticides Program revenues from fees and charges are described below. The amount of most fees are set in statute. The only fees not set in statute are those for pesticide operators, the temporary waste pesticide collection/recycling project (partially), and the training fees. The earmarked pesticide management account established in Section 17-2-102, MCA is the source of 59.5% of the program budget for the biennium and derives its revenue from the following sources.

<u>Type</u>	<u>Amount</u>	<u>FY 95 Revenues Total</u>	<u>Allowed Uses</u>
<b>Pesticide registration fees</b>	\$70 annually	\$403,660	administering the Act only
<b>STIP units (state interest)</b>		\$13,458	"
<b>Government dealer license</b>	\$50 ann	\$1,975	"
<b>Government applicator license</b>	\$50 ann	\$11,143	"
<b>Pvte applicator permit (farms)</b>	\$35 @ 5yrs*	\$21,397	* see below
<b>Pesticide dealer license</b>	\$45 ann	\$21,120	administering the Act only
<b>Pesticide operator license</b>	\$25 ann	\$7,555	" " "
<b>Pesticide applicator license</b>	\$45 ann	\$49,445	"
<b>Pesticide waste fees</b>	\$2 per lb.	\$76,230	waste pesticide prog. only
<b>Pesticide recycling fees</b>	\$30 ann	\$35,367	pesticide container prog. only
<b>* MSU private applicator fees</b>	\$5 per app.	\$6,250	to develop training materials
<b>* Extn Serv Co training fee</b>	\$15 per app.	<u>\$18,765</u>	to conduct training
<b>TOTAL</b>		<b>\$666,366</b>	

\* fees from this licensing fee are earmarked for the MSU Extension Service for training materials and to county extension offices for farm applicator training. Of the \$35 fee; \$15 goes to the MDA, \$15 to the county extension services, and \$5 goes to MSU.



#### Noncompliance Penalties

FY 1995

Noncompliance Penalties Proposed Average	\$ 250.00	
Total Proposed Penalties	\$4,950.00	
Average Final Penalty	\$ 190.00	
Total Final Penalties Collected (FY 95)	\$3,800.00	to General Fund

**4. Regulated Communities.** Consistent with the activities noted above, the MDA Pesticides Program is involved with:

- Pesticide manufacturers, formulators, and distributors to register approximately 5,904 pesticides annually.
- Licensing of approximately 1,554 commercial and governmental pesticide applicators annually.
- Licensing of approximately 1,413 pesticide operators annually.
- Licensing approximately 475 pesticide dealers annually.
- Permitting approximately one-fourth of the 8,667 private farm and ranch owner pesticide applicators per year.
- Users of general pesticides in urban and suburban settings and farms and ranches not required to be licensed.

The regulated community is usually identified through the licensing, training, and permitting programs, dealer sales records, and citizen reports. Key regulated communities are as follows:

**Commercial and governmental pesticide applicators and operators.** Testing by the department is required for licensing of commercial and governmental pesticide dealers and applicators. Training is optional but, once tested and licensed, these individuals must obtain 12 credit hours of training over a 4 year period to remain qualified. An 80% or higher score on the examination results in an applicator being "certified" and therefore qualified and licensed to apply and purchase the more hazardous "restricted use" category of pesticides.

**Private pesticide applicators and operators (farmers and ranchers).** The MSU Cooperative Extension Service and the County extension services provide initial training and testing for private applicators (farmers and ranchers). These individuals are only required to obtain a permit if they wish to apply "restricted use" pesticides. The permit is good for 5 years but requires 6 credit hours of training to remain qualified over the period.

There are somewhat different training regimens and examinations for different categories of pesticide applicators. The MDA issues 18 different categories of license; i.e. aquatic pest control, ornamental and turf pest control, agricultural pest control, and others.

**Pesticide manufacturers and formulators.** Businesses that repackage or produce (manufacture) pesticides can be identified because they are required by federal laws to register with the EPA as a pesticide producing establishment. The identity of registered pesticide production establishments is available from the EPA.

**Pesticide dealers.** Pesticide dealers are licensed by the MDA. Dealers who sell pesticides used for home, yard, garden, and general home use in small containers (retail pesticides) are not required to be licensed.

**5. Philosophical Approach to Compliance.** The Pesticides Program relies heavily on education and educational requirements to assure that dealers and applicators of pesticides are qualified. The MDA relies on educational efforts by the MSU Cooperative Extension Service and the County extension service networks to educate farm applicators. The large universe of regulated individuals and limited MDA staff requires prioritization of compliance and enforcement efforts.

High priority activities are conducting inspections of newly licensed pesticide dealers and commercial and governmental applicators within the first year of licensure; investigation of all reports of pesticide misuse, damage from pesticides, improper practices and violations of law; and investigations of off target pesticide drift. Individuals or companies handling large quantities of pesticides or which have contact with the public during sales have a higher regulatory priority for the department. High priority regulatory targets include routine inspections of commercial pesticide applicators, government pesticide applicators, dealers, manufacturers, and formulators of pesticides.

Low priority efforts include inspections of the 8,667 (1995 figures) permitted farm and ranch applicators who use restricted pesticides and the unknown number of users of general pesticides for which licensing and training is not required. However, any reports of noncompliance among these persons are priorities for investigating and correcting.

**6. Compliance Tools Available and Used.** A variety of training manuals have been produced and are available at nominal charge to provide education on pesticide handling, use, application, and disposal. A February 1996 *Compliance Assistance Inspection Policy and Procedure* document has been produced which attempts to obtain voluntary compliance with program requirements for new dealers and applicators through an inspection/amnesty/and training process. Key tools for obtaining compliance identified by the agency are routine inspections, investigations in response to complaints, sampling, and compliance assistance.

When enforcement action is deemed necessary, notices of violation (NOV's) are the most commonly used compliance enforcement efforts. They are typically written for what the agency considers to be minor first-time offenses.

Types of enforcement responses and penalty amounts are established by statute, and statute requires that, prior to issuing penalties, the department consider the gravity of the violation, degree of harm, degree of care, and effect on a person's ability to stay in business. The program has very specific rules at 4.10.1005 ARM which detail the administrative civil penalties to be applied. Also, ARM 4.10.1006 through 1008, ARM provide very specific program guidance in determining gravity of violation and degree of harm.

The menu of tools used by the Pesticides Program to achieve compliance is shown on the following pages.

**7. Incentives for Compliance.** According to program staff, a variety of incentives exist. Effectiveness varies depending upon the incentive and among different members of the regulated community. Program staff also suggested that a good view of incentives could be obtained from the regulated community.

**Agency-Generated.** Statute and Rules: The mere presence of laws prompts compliance. A number of factors influence the level of this compliance including how the laws and rules are viewed, the segment of the regulated community, and others. For the most part, and the agency believes that most members of the regulated community would agree, program staff state that pesticide laws are not inordinately complex, are consistent with federal and other state laws, and are not extremely difficult to comply with. Most large businesses such as pesticide manufacturers, large pesticide dealers, and commercial pesticide

applicators probably try to comply with laws and see some incentive in terms of being good stewards and maintaining good records of compliance. Smaller operations, individuals, and certain culpable persons are probably less likely to comply merely because of the presence of a law. They may not be fully aware of the requirements, or have difficulty in the expense of meeting requirements or understanding the law.

**Regulatory Presence:** The possibility of being inspected or being investigated as the subject of a complaint is a powerful incentive for compliance. This is enhanced in the Pesticides Program by the field offices which provide a local, readily accessible presence and by experienced staff who are able to identify violations, know how to obtain evidence, and who take an objective, professional approach to their duties. These factors provide a strong incentive among commercial, government, and noncommercial applicators and among licensed pesticide dealers because they are inspected approximately every four years. The affect of this incentive is less among permitted farm applicators, unlicensed pesticide users, and pesticide retailers (home lawn and garden sales) who, because of the sheer numbers and limited division resources, are not inspected routinely.

**Penalties:** Pesticide law provides a full range of penalties ranging from written warnings to license revocation or criminal sanctions. Many persons will comply because they want to keep a "clean record" and are concerned about the blemish associated with a violation and subsequent enforcement action no matter how severe. The possibility of a civil penalty is a financial incentive particularly among small businesses, farmers, and private persons to whom the civil penalty amounts authorized by statute can be substantial.

**Industry-Generated Incentives:** Industry organizations provide a positive incentive for compliance when they encourage and support compliance with laws, when there is a cooperative approach between state regulatory agencies and these organizations in developing and implementing laws, and where the membership can see the positive relationship. Organizations that promote compliance in Montana include the Montana Agricultural Business Association, Association of Montana Aerial Applicators, Association of Montana Turf and Ornamental Professionals, and Montana Aviation Trades Association.

**Education:** While education may not, in a true sense, be an incentive to comply with the law, it is a way to make full use of other incentives. For example, education is an important way to inform people about the existence of the pesticide law, its details, and reasons for regulating pesticides. The individual will be more likely to comply once informed about the presence of the law and the penalties for noncompliance. Education also gives the department an opportunity to convince persons to comply with pesticide laws by discussing needs for the law and the consequences of noncompliance including the detrimental effects from illegally used pesticides.

It should be pointed out that compliance among some culpable individuals is difficult no matter what the incentive. The department has had experiences with individuals who did not comply with the law for various reasons, whether because of political views or because the incentives were not there.

STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM			
Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<p>Education\Information\Technical Assistance: On-site Technical Assistance</p> <p>Technical/Training Seminars</p> <p>Compliance Assistance Inspection and Training</p> <p>Retail pesticide sales-education program</p>	<p>Generally: When the MDA deems it necessary to inform dealers and persons applying pesticides in proper methods of formulating, applying, storing, disposing, handling, and transporting pesticides.</p> <p>* Private Applicator Training; * Commercial Applicator Training</p> <p>Provide first time inspection and compliance assistance to new dealers and applicators at their request with opportunity for violation amnesty granted for less than egregious violations (repeat violations, those resulting in serious environmental harm or injury). Compliance assistance also includes formal training (classroom or one-on-one) and technical assistance.</p> <p>Subject to funds available, the MDA and MSU Extension service to establish program for general public and retailers on pests, pesticides and alternative control methods.</p>	<p>MDA, MSU Ext. Service, County Ext. services, field staff others</p> <p>field staff; Field Serv. Bureau</p>	<p>2000</p> <p>20 PAT * programs 60 CAT * programs</p> <p>63</p> <p>Brochures Video</p>
Comprehensive Planning\Withdrawals:	MCA Section 80-8-105(3) authorizes the agency to promulgate rules, emergency or otherwise, to restrict the use of a pesticide geographically, temporally, etc. to prevent damage to agriculture or the environment.	Director, Div.. Admin.	0.00

# STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM

Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<b>Permits\Certifications\Bonds:</b> Registration of pesticides  Licensing;  1) Pesticide applicators  2) Pesticide operators  3) Permitting of farm applicators.	When any EPA registered or approved pesticide is sold, distributed, or transported within Montana and upon receipt of annual application, fees, and complete copy of the pesticide label.  Upon application, passage of exam, payment of annual or multi-annual fee, maintenance of training credits. 1) applicators license: required for any person applying pesticides commercially for another, and required for government agents applying pesticides for a government agency. 2) operators license: required for any person operating pesticide equipment in the employ of a licensed commercial applicator and for employees operating pesticide equipment for a government agency licensed as an applicator. 3) farm applicator special use permit required to purchase and use a "restricted use" pesticide. Permit good for 5 years.	staff  staff  staff  staff	5,904  1) 1,554  2) 1,413  3) 1,653
Licensing of Pesticide Dealers  Bonds  Financial Responsibility	Upon application, passage of exam, payment of annual license fee, maintenance of training credits. "Dealer" sells, wholesales, barbers, etc. pesticides in Mont. but the term dealer here does not include a person who sells pesticides used for homes, lawns, and gardens.  not authorized  Required by agency rules for commercial pesticide applicators; Required annually and can be increased depending on applicator's history of compliance. minimum is \$1500\year for aerial applicators; \$500 for others.	staff  staff	475  1,554

STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM			
Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<b>Monitoring/Inspections:</b> Compliance Inspections: - Pesticide Producers (Manufacturers) -Dealers and applicators; Commercial, noncommercial and government) -Permitted Farm Applicators and Unlicensed Pesticide Users and Retailers Pesticide product sampling & analysis -Residue Sampling and Analyses	<p>Upon reasonable cause, with consent of inhabitant or owner, or following issuance of a warrant.            Routine inspections 3-4 year intervals, investigations on receipt of complaint.</p> <p>Routine inspection the first year of licensure and routinely every 3-4 years thereafter; or upon receipt of complaint of damage or violation.</p> <p>Upon receipt of complaint of damage or violation. Limited number of routine inspections (30 in FY 96) of permitted farm applicators; no routine inspections of unlicensed pesticide users or retailers.</p> <p>Authorized with a warrant or with consent of the inhabitant or owner to have access to pesticides, devices, or records. Routine samples confirm that pesticides meet label claims. Product samples/Product analyses</p> <p>Vegetation , soil, water, and other media for residue analyses to obtain documentation of pesticide damage and evidence for investigation. Authorization extends to permission granted by inhabitant or owner of property or with issuance of a warrant.</p>	<p>Staff, Inspectors</p> <p>Staff, Inspectors</p> <p>Staff, Inspectors</p> <p>Inspectors</p> <p>Laboratory</p> <p>Staff, Inspectors</p> <p>Laboratory</p>	<p>630 total</p> <p>17</p> <p>561</p> <p>52</p> <p>22</p> <p>45</p> <p>168</p> <p>1,097</p>

# STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM

Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<p><b>Administrative Notices\Orders:</b>  Notice of Violations; Notice of non-compliance..NONC or NOV  Sec. 80-8-306(3)</p> <p><b>Compliance orders\</b>  Administrative order  Sec. 80-8-305</p>	<p>Department is authorized to issue written warnings or orders for minor violations when this is in the public interest. Notices of noncompliance are standardized forms that field staff use for issuing written warnings.</p> <p>3-13-95 Draft Policy to issue when:</p> <p>Bureau chief approves in cases of multiple or repeat violations.</p> <p>Pesticide misuse involving general pesticides only (not restricted) and no harm.</p> <p>Incomplete pesticide application or dealer records.</p> <p>License violations with mitigating circumstances.</p> <p>Misuse of retail pesticides with only minor harm to property, vegetation, etc.</p> <p>Label directions inconsistent with recommendations and no harm done.</p> <p>Violations of administrative rules.</p> <p>Faulty equipment or storage facilities.</p> <p>Upon violation of the law; also to require cleanup of pesticides purposely and improperly dumped, spilled, used or misused.</p>	<p>Field staff and Supvr., Bureau Chief</p> <p>Div.. Admin., Director</p>	<p>31</p> <p>1</p>

STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM			
Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<b>Administrative Penalties\Sanctions:</b> Administrative civil penalty up to \$2500/offense except for permitted farm applicators which can receive a maximum of \$500 for the 1st offense Sec. 80-8-306(5)	For major or serious violations as defined in 80-8-306 5(e) May not be assessed without notice, and prior opportunity for a hearing and appeal under Montana Administrative Procedures Act.	Bureau Chief, Div Admin., Director	13
Embargo of pesticide products Sec. 80-8-303 License\Permit restrictions; - Deny Registration of Pesticide	Upon probable cause of violation of labeling, registration, adulteration, mis-coloring requirements. When information required to be submitted for registration is lacking, for failure to obtain an EPA registration number, or if label claims are not supported by test data.	inspectors, supervisors	1
- Restriction of Sale or Use	When necessary to prevent damage to agriculture or the environment. See MCA Section 80-8-105 (3) discussion above under "Comprehensive Planning\Withdrawals.	Director, Div. Admin.	0
- Suspend or Cancel	If pesticide is suspended or canceled by a federal agency or when information is provided that indicates adverse affects of product.	Director	0
- Dealers License refusal	Person is not qualified to sell pesticides	staff	0
- License or permit Revocation or Modification	Person has committed any of the violations set forth in MCA 80-8-211(1)(a) through(l) Agency may revoke, deny or modify: for lack of qualification in pesticide use and violations of the law, rules or lawful orders of the department. Department actions are subject to appeal.	Director, Div. Adm.	0



# STATE COMPLIANCE AND ENFORCEMENT TOOLS -- PESTICIDES PROGRAM

Tools Authorized	"Trigger" (When Used)	Authority to Complete	Times Used (95)
<b>Administrative Penalties/Sanctions cont'd:</b> Opportunity for Appeal	Department decisions relating to issuing or revoking licenses or permits may be appealed according to provisions of the Montana Administrative Procedures Act.		0.00
<b>Civil Judicial Actions:</b>  Civil Penalties: \$25,000\offense Sec. 80-8-306(5)(c)(I)  Injunctions Sec. 80-8-306(2)	For major violations as defined above which also result in significant harm to humans, commodities, livestock or the environment.  To restrain a violation or a continuing violation of law or rule.	Div. Admin., Director, District Court  District Court	0.00
<b>Criminal Judicial Actions:</b>  Misdemeanor fines \$100-\$1500 Sec. 80-8-306(1)  Felony Penalties up to \$50,000 and/or 10 years imprisonment	For violations of law or rule or preventing or attempting to prevent Dept. from performing its duty under the law.  When, in addition to the conditions and imposition of the civil penalty above, the violation was willfully committed.	County Attorney  Div. Admin., Director, District Court	0.00

notes: The MDA Pesticides Program receives assistance in the legal resolution of violations from the single attorney assigned to the MDA.

**8. History of Compliance.** Over the fiscal years of FY 92, FY 93 and FY 94, the MDA Pesticides Program investigated (FY 92 - 120, FY 93 - 95, FY 94 - 57) a total of 272 possible violations discovered by inspections, tips and complaints.

During this time the MDA issued 32 significant violations such as civil penalties and 68 nonsignificant violations such as notices of violation. The other 172 violations investigated, found no violation or insufficient evidence to support an enforcement action. In many of these situations, the MDA sends an informative type letter.

The MDA staff conducts comprehensive inspections and investigations. Therefore, one inspection or investigation can result in multiple possible violations such as misuse, operations, records or licensing.

The following tables show a breakdown of the enforcement actions taken, significant and nonsignificant, and the number of inspections conducted that were in compliance.

<b>FY 92</b> Inspections/ Investigation	Commercial/ Government/Noncom- mercial Applicators	Dealer	Permitted Private Applicators	Unlicensed Persons & Persons not Required to be Licensed
Significant Violations	13	3	0	0
Other Non- Compliance	20	5	2	2
In Compliance	545	276	10	64

<b>FY 93</b> Inspections/ Investigation	Commercial/ Government/ Noncommercial Applicators	Dealer	Permitted Private Applicators	Unlicensed Persons & Persons not Required to be Licensed
Significant Violations	6	5	1	0
Other Non- Compliance	17	4	2	2
In Compliance	527	197	8	59

<b>FY 94</b> Inspections/ Investigations	Commercial/ Government/ Noncommercial Applicators	Dealer	Permitted Private Applicators	Unlicensed Persons & Persons not Required to be Licensed
Significant Violations	5	3	0	0
Other Non- Compliance	6	6	1	0
In Compliance	388	227	4	63

The number of investigations vary from year to year because agriculture and pesticide use varies with

weather conditions, pest outbreaks, rainfall and crop types or prices. For example, if there is an outbreak of grasshoppers, the amount of insecticide applied will increase and as a result there would be more investigations and complaints. Another example might be a cold wet spring, in which case there might be a decrease in amount of herbicide being applied because the weeds aren't maturing and, as a result there will be fewer investigations or complaints related to herbicide use.

**9. "Violations."** Serious violations are those violations for which an administrative civil penalty, a judicially imposed civil penalty and/or a judicially imposed felony penalty may be imposed (see "tools" matrix above). Serious violations are defined in Section 80-8-306(5)(e), MCA as one or more of the following:

1. misuse of a pesticide that results in proven exposure or proven harm to humans, livestock, agricultural commodities or the environment.
2. selling restricted pesticides to unauthorized or uncertified persons.
3. use or sale of unregistered pesticides.
4. failure to keep pesticide sales and application records.
5. using or selling pesticides without the required license or permit.
6. noncompliance with pesticide worker protection standards or labeling requirements.
7. noncompliance with pesticide ground water and EPA endangered species standards and labeling.
8. noncompliance with pesticide or pesticide container disposal, labeling, or handling requirements
9. reoccurrence of the identical violation of the law within 2 years of the previous violation.

During the 1995 calendar year, the Pesticides Program issued 32 NOVs. Five were issued to dealers, 26 to commercial/government applicators, and 1 to a permitted farm applicator. There were no repeat violators in that time period.

During 1995, 18 proposed administrative civil penalty notices were issued totaling \$3,950.00, resulting in the resolution of 18 violations and the collection of \$3,250.00 in final civil penalties. No judicial actions were considered or filed.

During 1995 there were no revocation, modification or denial actions taken on licenses.

About 50 investigations were conducted in 1995, down from a more typical 80 per year.

The Calendar Year (CY) 95 list of pending and new Pesticides Program violations is shown below.

The following abbreviations are applicable to the next four tables:

CP - Civil Penalty	12 - Commercial Applicator
M - Being monitored	10 - Pesticide Dealer
NOV - Notice of Violation	15 - Governmental Applicator
R - Being reviewed	11 - Permitted Private Applicator
SBI - Still being investigated	N/A - Not required to have license or unlicensed
	CR - Case Review
	ER - Enforcement Response Issued

**ISSUED in CY 95: SIGNIFICANT VIOLATIONS**

Date Insp. or Investigation Initiated	Case Number	Type of License	Description of Violation	Date Action Issued	Enfor. Action Taken	Sig. Vio. Yes or No
09-29-93	93-1267	12	Improper lic.	05-19-95	\$250 CP	Y
09-25-92	92-1321	12	Misuse	05-04-95	\$150 CP	Y
06-23-92	92-1335	12	Misuse	05-04-95	\$200 CP	Y
		12	Improper lic.	05-04-95	\$250 CP	Y
10-05-92	92-1368	12	Misuse	05-04-95	\$100 CP	Y
		12	Improper lic.	05-04-95	\$100 CP	Y
09-28-93	93-1415	12	Improper lic.	04-06-95	\$100 CP	Y
		10	Sale to unlic. indiv.	04-06-95	\$100 CP	Y
04-19-95	95-1721	10	Sale of unreg. pesticide	06-05-95	Refer to EPA	Y
09-21-94	94-1817	10	Repackaging pesticides	06-23-95	Refer to EPA	Y
12-21-94	94-1830	10	Sale to unlic. indiv.	05-08-95	\$250 CP	Y
05-04-95	95-1858	10	Sale to unlic. indiv.	07-12-95	\$250 CP	Y
11-23-92	93-577	10	P.E. Records	05-19-95	Refer to EPA	Y
05-27-93	93-584	12	Improper lic.	05-16-95	\$250 CP	Y
06-28-94	94-659	12	Spilled pest.	05-08-95	\$250 CP	Y
		12	Failure to keep records	05-08-95	\$150 CP	Y
06-29-94	94-660	12	Misuse	05-22-95	\$150 CP	Y
08-19-94	94-664	12	Improper lic.	07-13-95	\$150 CP	Y

09-29-94	94-674	12	Improper lic.	05-18-95	\$150 CP	Y
09-01-92	92-935	12	Misuse	05-26-95	\$250 CP	Y
02-19-93	93-958	10	Sale to unlic. indiv.	07-21-95	\$250 CP	Y

Total Proposed CP's \$3,950.00

Total Final CP's \$3,250

**ISSUED in CY 95: NONSIGNIFICANT VIOLATIONS**

Date Insp. or Investigation Initiated	Case Number	Type of License	Description of Violation	Date Action Issued	Enfor. Action Taken	Sig. Vio. Yes or No
09-29-93	93-1267	12	Misuse	05-19-95	NOV	N
		12	Records	05-19-95	NOV	N
09-25-92	92-1321	12	Records	05-04-95	NOV	N
06-08-92	92-1345	12	Faulty Oper.	05-04-95	NOV	N
06-24-92	92-1346	12	Misuse	05-04-95	NOV	N
		12	Records	05-04-95	NOV	N
09-28-93	93-1415	12	Records	04-06-95	NOV	N
05-31-94	94-1571	12	Misuse	05-16-95	NOV	N
		12	Records	05-16-95	NOV	N
06-27-94	94-1666	12	Misuse	06-08-95	NOV	N
06-22-94	94-1694	11	Misuse	05-24-95	NOV	N
06-17-94	94-1695	12	Records	05-24-95	NOV	N
03-25-92	92-1827	12	Sale w/o lic.	04-28-95	NOV	N
12-21-94	94-1830	10	Records	05-08-95	NOV	N
04-11-94	94-1982	10	Records	03-15-95	NOV	N
07-12-94	94-2084	12	Records	05-04-95	NOV	N
11-14-94	94-2156	12	Records	05-23-95	NOV	N
05-24-95	95-2310	12	Records	07-28-95	NOV	N
06-25-91	91-38	10	Fed records	05-19-95	NOV	N
05-31-94	94-645	12	Improper lic.	05-22-95	NOV	N
06-28-94	94-659	12	Faulty equip.	05-08-95	NOV	N
		12	Misuse	05-08-95	NOV	N
06-29-94	94-660	12	Records	05-22-95	NOV	N
06-28-94	94-662	15	Misuse	07-31-95	NOV	N

08-19-94	94-664	12	Records	07-13-95	NOV	N
		12	Misuse	07-13-95	NOV	N
09-27-94	94-669	10	Sale Unreg. pesticides	05-22-95	NOV	N
09-29-94	94-674	12	Records	05-18-95	NOV	N
09-01-92	92-935	12	Improper lic.	05-26-95	NOV	N
02-19-93	93-958	10	Records	07-21-95	NOV	N
02-10-93	93-983	12	Misuse	05-19-95	NOV	N
		12	Sale w/o lic.	05-19-95	NOV	N

**95 CASES PENDING in CY 95 (Status at Year-end)**

Date Insp. or Investigation Initiated	Case Number	Type of License	Description of Violation	Pending ER Issues Case Status	Sig. Vio. Yes or No
06-09-95	95-1305	10	Sale w/o lic.	CR	*
06-23-95	95-1310	12	Pest. residue in soil	CR	*
07-31-95	95-1614	12	Pest. residue in soil	CR	*
08-03-95	95-1615	12	Drift	CR	*
10-03-95	95-1616	12	Drift	SBI	*
05-12-95	95-1683	12	Drift	CR	*
07-18-95	95-1725	12	On site damage	CR	*
04-04-95	95-1839	N/A	Pest. residue in soil	CR	*
05-11-95	95-1859	10	Mislabeled containers	CR	*
05-18-95	95-1869	12	Drift	CR	*
05-23-95	95-1871	10	Sale to unlic. indiv.	CR	*
02-09-95	95-1970	12	On site damage	CR	*
05-30-95	95-2158	12	Unlicensed	CR	*
05-31-95	95-2311	11	Drift	CR	*
06-13-95	95-2314	15	Drift	CR	*
08-09-95	95-2323	12	Misuse	CR	*
07-24-95	95-2324	12	Misuse	CR	*
10-10-95	95-2351	12	Unlicensed	CR	*

01-12-95	95-2393	10	Pesticide contamination	CR	*
09-07-95	95-2496	12	On target damage	CR	*

**94 AND OLDER CASES PENDING in CY 95 (Status at Year-end)**

Date Insp. or Investigation Initiated	Case Number	Type of License	Description of Violation	Case Status	Sig. Vio. Yes or No
09-23-93	93-876	15	Pest. residue in soil	ER	Y
10-7-91	91-074	12	Unlicensed	ER	Y
04-03-90	90-1991	12	Soil remediation for DDT	ER	Y
02-23-92	92-539	15	Pest. spill	ER	Y
08-17-93	93-1485	12	Misuse/Drift	Contested Case	Y
10-03-94	94-1823	11	Improper container disposal	ER	Y
07-24-94	94-1667	15	Pest. residue in soil	Cleanup approved	Y
12-21-94	94-1968	12	Misuse/damage	CR	Y
12-20-91	92-002	N/A	Pest. spill	ER	N
11-16-92	92-1126	12	Pest. residue in soil	SBI	*
07-13-94	94-1307	N/A	Pest. in G.W.	SBI	*
06-21-94	94-682	N/A	Pest. residue in soil	SBI	*

\* Significance not determined prior to final case review and issuance of enforcement response.

**Discovery of Violations.** Most violations in the Pesticides Program are discovered through inspections, tips and complaints. The MDA records but does not track discovery or who reports a complaint. But review of the enforcement actions issued in CY 95 shows the following:

## METHOD BY WHICH VIOLATIONS WERE DISCOVERED IN CY 95

	Tip or Complaint	Routine Inspection	Other Agency Referral
Comm/Gov Applicators	33	7	0
Pesticide Dealers	3	8	1
Permitted Farm Applicators	1	0	0

**10. Considerations in Calculating Penalties.** The Pesticides Act contains rather specific penalties allowable for violations of the law and it defines major violations in the statute. The Act specifically states that the department is not required to report minor violations of the law for prosecution or to initiate seizure or embargo proceedings if the department can serve the public interest through issuance of a warning or order. The law also requires the department to consider gravity of the violation, the degree of care taken by the offender, the degree of harm caused and the effect on a person's ability to stay in business when the department is determining the amount of any civil penalty to be assessed in response to a violation.

The Pesticides Program uses a matrix in ARM 4.10.1005 to assess administrative civil penalties for defined major violations. There is no other "penalty formula" for determining judicial misdemeanor, criminal or civil penalties. The matrix provides the MDA with a range of economic penalties for a variety of offenses. The Act provides that these penalties cannot exceed \$2,500 for each offense but that the penalty cannot exceed \$500 for the first offense committed by a permitted farm applicator. The agency then uses the above mentioned gravity criteria as required by law and set forth in rule to arrive at a proposed administrative penalty. The agency intends to amend the civil penalty rules to reflect amendments to the act in 1995.

There are no "per day" violation penalties. The penalty amounts are per violation and are listed in the matrix.

Aside from the administrative penalty matrix in rule, the following factors are considered in establishing each penalty amount.

### Gravity of Violations:

- Classification of pesticide (restricted or general use)
- More toxic pesticide involved
- Antidote not available
- Residue levels exceed tolerances or action levels
- Extent of harm to human health, commodities, environment or livestock
- Person's history of compliance
- Ambient air levels exceed standards
- Timeliness in correcting a violation
- Cooperation during an inspection or investigation
- Multiple violations
- Violations have potential to cause exposure or harm
- Timely settlement of damages
- Knowledge of act or rules that were violated

### Degree of Care:

- Misuse involving little or no negligence may mitigate a penalty
- Misuse involving negligence may have a neutral affect on a penalty
- Misuse involving gross negligence may enhance a penalty



**Affect on a Person's Ability to Stay in Business:**

The department will consider the financial affect on "ability to stay in business" when the charged person submits bonafide financial information. This may consist of copies of tax returns and financial statements, and the person may request a reduction in a penalty or an alternate payment schedule.

The "starting point" for the amount of civil penalty, prior to any adjustments based on penalty mitigators or enhancers, is set at agency discretion. This starting point is consistent from one case to another. This consistency is assured by reviewing past cases and by the experience of staff involved in penalty determination.

**11. Resolution of Noncompliances.** During the fiscal years of 92, 93, and 94 the MDA issued 32 significant violations such as administrative civil penalties and EPA referrals and 68 nonsignificant violations such as Administrative Notices of Violation. The other 172 violations investigated, found no violation or insufficient evidence to support an enforcement action. In many of these situations, the MDA sends an informative type letter. No judicial actions or license revocation, modification or denial actions were taken during this time.

The MDA staff conducts comprehensive inspections and investigations. Therefore, one inspection or investigation can result in multiple possible violations such as misuse, operations, records or licensing.

The first table below illustrates a breakdown of the violations for pesticide license categories for FY 92, FY 93, and FY 94. The 2nd table below shows resolutions of violations and the number still unresolved for FY 92, FY 93 & FY 94 (see tables in sections 8 & 9 for further break down).

**NUMBER OF VIOLATIONS FOR PESTICIDE LICENSE CATEGORIES**

Federal Fiscal Year	Commercial/ Government/ Noncommercial Applicator	Dealer	Permitted Farm Applicator	Unlicensed	Total
1992	33	8	3	2	46
1993	23	9	3	2	37
1994	12	9	1	0	22

**RESOLUTIONS OF VIOLATIONS**

Federal Fiscal Year	Administrative Civil Penalty	Notice of Violation	Orders	EPA Referrals	Unresolved	Total
1992	16	29	0	1	5	51
1993	8	23	2	4	2	39
1994	6	14	0	2	5	27

**12. Current Compliance Priorities.** The Department of Agriculture identified the following current, long term compliance priorities for the Pesticides Program:

- Conduct educational programs to qualify pesticide applicators and dealers. Priorities for education are pesticide dealers, commercial applicators, government applicators, permitted farm applicators, and

certified noncommercial applicators. Lower priorities are pesticide retailers and nonlicensed pesticide users.

- Investigate complaints of pesticide misuse and violations of pesticide laws. High priorities for investigation include situations dealing with harm to human health, agriculture or the environment, restricted use pesticides, licensed pesticide applicators and dealers, large scale pesticide use such as government programs or block spraying, canceled or suspended pesticides, and farm worker protection.
- Assure that pesticides being sold are registered by the EPA and the Montana Department of Agriculture and are labeled as required by law. This is accomplished by routine (neutral) inspections of businesses that sell pesticides. Priorities for inspection are larger businesses that sell nonretail pesticides (larger containers). Lower priorities include pesticide retailers (home, lawn, and garden), dealers of animal health products, and others that sell small volumes or small containers.
- Assure that pesticides are applied according to label directions. This is accomplished by routine (neutral) inspections of pesticide applicators. Priorities for inspection of applicators are those that apply large volumes to property other than their own (commercial, government and certified noncommercial applicators). Permitted farm applicators and unlicensed applicators of general use pesticides are lower priorities for inspecting.
- Conduct pesticide sampling and analyses to investigate the effects of pesticide residues and assure that pesticides being sold meet label claims and are not adulterated.

The Department of Agriculture identified the following short term compliance priorities) over the next 12 months:

- Complete case review and enforcement response for all investigations and violations that occurred in calendar year 1995.
- Enter into a cooperative agreement with the U.S. Environmental Protection Agency for fiscal year 1997 to assure that Montana retains primacy for pesticide enforcement.
- Refine procedures for enforcing farm worker protection standards and incorporate these into the existing enforcement framework.
- Adopt policy as required by 80-8-120, MCA for review of local pesticide ordinances.
- Revise penalty matrix rule to implement amendments that revised penalties and enforcement statutes.
- Conduct compliance assistance and training for sugar beet and cherry growers. These crops are priorities because of the number of farm workers involved in growing and harvesting and the application of pesticides during or near the time that farm workers are employed.
- Update standard operating procedures for enforcement and sampling activities.

### **13. Compliance Relationships with Other Agencies.**

**Oversight - Cooperative Agreement with the E.P.A.** The MDA enters a yearly cooperative agreement with the Environmental Protection Agency (EPA). For the FY 96-97 biennium, EPA grant funds total \$990,706 or 38.2% of the Pesticides Program budget. This is \$300,000 higher than the usual EPA grant amount due to some additional tasks being undertaken by the state agency this biennium. The agreement includes the agency's commitment to check for compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as well as the Montana Pesticides Act in Montana. This agreement grants MDA primary responsibility for enforcing pesticide laws in Montana. In the event that a violation is one for which the state has no remedy, such as violations at pesticide formulators or manufacturers, federal facilities or on tribal lands, the MDA refers the violation to the EPA for resolution. The State EPA agreement spells out the obligations of MDA for the biennium including sampling, inspections, enforcement and compliance activities and tracking requirements, technical assistance, outreach and education efforts, and others. The MDA provides quarterly progress reports

to the EPA and is subject to mid-year and year-end program reviews.

**Partnerships.** The MDA Pesticides Program has a Memorandum of Understanding (MOU) with the Department of Environmental Quality (DEQ) which spells out an intent to cooperate in the handling and regulation of waste pesticides and used pesticides containers. Waste pesticides can be considered hazardous wastes by DEQ rules and regulations. Pesticide spills can be remediated as hazardous waste cleanups or as a beneficial use of a manufactured product through a cooperative effort between the MDA and DEQ. Similar situations can arise when addressing leftover pesticide residues in aerial applicator tanks.

The DEQ, Hazardous Waste Program implemented a waste pesticide and used pesticide container collection and recycling demonstration project in the late 1970s similar to that now being undertaken by the MDA Pesticides Program. The MOU sets forth the intent of both agencies to coordinate efforts and personnel in providing educational and regulatory services to the public and the regulated industry.

The MDA Pesticides Program also has MOUs with the Department of Defense and the U.S. Dept of Agriculture, Animal and Plant Health Inspection Service. The agreements are similar; they provide for reciprocity for pesticide applicator certification and allow the MDA to conduct inspections and investigate pesticide use at federal facilities. The agreements specify that significant violations discovered by the state will be turned over to the EPA for resolution.

There are unwritten cooperative agreements with the U.S. Fish and Wildlife Service and the Montana Department of Fish, Wildlife & Parks in regard to pesticide use and possible impacts on fish and wildlife, migratory waterfowl, and endangered species.

**Delegated Authority.** The MDA Pesticides Program does not delegate any of its authority to other agencies or units of government. The law provides that a local government may adopt a local pesticide ordinance but the ordinance must be submitted to the MDA for approval and it must be consistent with the authorities of the state Pesticide Act. A local government may petition the MDA to adopt a rule to address a specific local condition. As yet, no local government has submitted proposed local ordinances for approval or petitioned for proposed rule changes.

# Montana Agricultural Chemical Ground Water Protection Program

Montana's constitution requires the Montana Department of Agriculture (MDA) to protect, enhance and develop all agriculture in the state. The constitution also provides for the maintenance and improvement of a clean and healthy environment for present and future generations. The MDA is made up of 3 divisions, one of which is the Agricultural Services Division. That division administers the Montana Agricultural Chemical Ground Water Protection Act.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Agricultural Chemical (fertilizers and pesticides) Ground Water Protection Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. XII, Sec. 1** provides for a Department of Agriculture and laws and appropriations to protect, enhance, and develop all agriculture. **Sec. 2** provides that special levies may be made on livestock and on agricultural commodities for disease control and indemnification...inspection, protection, research and promotion. Revenue derived can be used only for the specified purposes. **Art. IX, Sec. 1** provides for the maintenance and improvement of a clean and healthful environment for present and future generations.
- **Montana Agricultural Chemical Ground Water Protection Act** (MCA 80-15-102 et. seq.) provides for proper use and management of agricultural chemicals whereby ground water resources are protected.

Supplemental and/or related state authorities:

- **Montana Pesticides Act** (MCA 80-8-101 et. seq.)
- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)

- **related..Water Quality Act of Montana** (MCA 75-5-101, et. seq.)
- **related..Public Water Supply Act** (MCA 75-6-101, et. seq.)

Related federal authorities:

- **Safe Drinking Water Act** (SDWA) Pub. Law 93-523.
- **Federal Insecticide, Fungicide, and Rodenticide Act** (FIFRA) PL. 92-516.

Agricultural Chemical Ground Water Protection Act rules

- ARM 4.11.101-403, ARM 4.11.601-605, ARM 4.11.901-917, ARM 4.11.1101-1117.

Specific enforcement authority:

- MCA 80-15-104, 80-15-202, and 80-15-401 et.seq.
- ARM 4.11.901-917

Primary and jurisdictional agreements:

- EPA Cooperative Agreement
- MOU with the DEQ Water Quality Division

**2. Program Goals.** Based upon the above-referenced guidance, the Agricultural Chemical Ground Water Protection Program has identified the following program goals:

1. Protect ground water and the environment from impairment or degradation due to the use of agricultural chemicals (pesticides and fertilizers).
2. Allow for the proper and correct use of agricultural chemicals.
3. Provide for the management of agricultural chemicals to prevent, minimize and mitigate their presence in ground water.
4. Provide for education and training of agricultural chemical applicators and the general public on ground water protection, agricultural chemical use, and the use of alternative agricultural methods.
5. Provide for the proper management of agricultural chemicals by establishing specific management plans to prevent, minimize and mitigate their presence in ground water.

**3. Program Activities.** In general, the Montana Department of Agriculture (MDA) is responsible for the preparation, implementation, and enforcement of agricultural chemical ground water management

plans for Montana. The agricultural chemical ground water General Management Plan (GMP) was submitted to the EPA in 1995. This plan is not enforceable. It provides guidelines, information and sets the policy groundwork for additional site specific or chemical specific plans which will be enforceable. The MDA, in concert with the Department of Environmental Quality (DEQ), Water Quality Division (WQD), is authorized to sample ground water for the presence of agricultural chemicals. The MDA is authorized to prepare, implement, adopt and enforce specific management plans (SMPs) for specific management zones and or for specific agricultural chemicals. These plans are adopted by rule and are enforceable documents. The MDA, working with other agencies and the Montana State University (MSU) Extension Service in particular, has provided considerable training and education to users of agricultural chemicals on ground water science, pollution prevention, and the proper use of agricultural chemicals.

Current enforcement activities are primarily in training staff, developing program procedures, assisting with writing the General Management Plan and preparing to write Specific Management Plans. Enforcement staff have investigated a number of sites where ground water or soils are contaminated with agricultural chemicals. Also, FY 95 pesticide inspection records show that 83 pesticide inspections included a ground water component. This component includes activities such as checking for compliance with ground water protection requirements on labels, sampling ground water, and investigating conditions related to agricultural chemicals in ground water.

About 30% of the ground water program staff are involved in direct field enforcement and compliance activities (investigations, inspections, case review, enforcement response and program management).

These activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1996 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
Administration	\$63,062	1.39			NA	
Field Services Bureau	\$111,440	2.32	5.2	Grndwtr Investig. Routine Inspects.	NA NA	3 83
Tech. Services Bureau	\$202,073	4.55		Grndwater Samples. Permanent Grndwtr monitoring sites.	NA NA	approx 400 8
				Develop Stndrd Operating Procedrs (SOPs) for sampling & monitoring Develop Specific Mgmt Plans (SMPs).	NA NA	20 1-2 <sup>2</sup>
Laboratory	\$193,378	2.29		Grndwater Analyses	NA	approx 600
<b>TOTALS</b>	<b>\$569,953</b>	<b>10.55</b>				

Notes:

1 Does not include support received from Central Management Division for personnel and legal services.

2 Depends upon requirements to write SMP's triggered by requirements in the law or by EPA requirements for SMP's published in the Federal Register.

**Fees and Charges.** The Agriculture Chemical Ground Water Protection Program (ACGWPP) revenues from fees and charges are described below. Except for the training fees the amounts of the fees are set in

statute.

<u>Type</u>	<u>Amount</u>	<u>FY 96 est. Total</u>	<u>Allowed Uses</u>
Pesticide Registration Fees:	\$80	\$477,964	program implementation <sup>1</sup>
Fertilizer Registration Fees:	\$10	\$21,772	program implementation
Training fees:	varies	\$3500	various training
Noncompliance Penalties:	varied	0	general fund
<b>TOTAL:</b>		<b>\$503,236</b>	

Notes:

<sup>1</sup> \$15,000 of these pesticide registration funds are earmarked each to the DEQ and to the MSU Extension Service for their assistance in helping MDA implement this Act. The remainder is earmarked for the MDA.

**4. Regulated Communities.** Consistent with the activities noted above, the ACGWP Program includes three primary regulated communities. These communities are described below.

- Pesticides handlers (applicators, dealers, formulators)
- Fertilizer handlers (applicators, dealers, formulators)
- Persons who use or sell pesticides or fertilizers for which a specific management plan has been adopted.

The ACGWP Act is a relatively new statute and the enforceable provisions have yet to be established. As specific management plans are written, the regulated community will be identified. For example, the EPA has informed states that specific management plans will be required for certain chemicals that have a potential to enter ground water. An example of one of these chemicals is atrazine. If a SMP is adopted for atrazine, it will specify conditions for sale or use which will be enforced and thereby create a specific regulated community of atrazine dealers or users.

The program seeks to prevent pollution of Montana's ground water resources from agricultural chemicals, specifically pesticides and fertilizers. As such, the regulated community is not easily divisible as with other programs. The regulated community is essentially the landowner above the potentially affected aquifer or the person(s) who uses/use agricultural chemicals which could contaminate an aquifer. This can include chemical applicators, chemical dealers or manufacturers through spills and mishandling, and the landowner. Pesticide dealers, fertilizer dealers, and some pesticide applicators are required to be licensed by the MDA and would be identifiable for training and possible regulation. On a voluntary basis, the same is true for landowners who desire training on ground water pollution prevention techniques or best management practices (BMPs).

**5. Philosophical Approach to Compliance.** The philosophy of the agency, as guided by the Montana constitution and statute, is that agriculture and ground water in the state can be protected and enhanced through the judicious use of pesticides and fertilizers. The department dedicates most of its program effort to prevention of ground water contamination by agricultural chemicals through the use of state MDA, federal EPA, and MSU Extension Service bulletins, brochures, and other training aids.

The Agricultural Chemical Ground Water Protection Program is presently a research and technical

assistance program. General statewide ambient ground water monitoring for contamination by agricultural chemicals has been ongoing since 1984, before the law was passed. The Montana ACGWP Act required the development of the General Management Plan principally as a tool to identify environmentally sensitive areas, soils, and aquifers and to develop best management practices for the use of agricultural chemicals in Montana.

**6. Compliance Tools Available and Used.** The program's key compliance methodology involves inspections and ground water monitoring. The development of the General Management Plan (GMP) sets the stage for future development of Specific Management Plans (SMPs) which set forth more precise management requirements for the use of agricultural chemicals in a way and in a specific geographic area such that pollution of ground water may be prevented. The ACGWP Program overlaps greatly with the department's pesticides program, and the two are often used in concert. For example, improper storage, use, or application of pesticides that result in ground water contamination in violation of the ACGWP Act can result in penalties under the Pesticides Act as well, including the loss of any applicable license granted under that Act. As yet, the ACGWPP has no formally adopted inspection or compliance/enforcement policy. The program has made a substantial effort at providing some high quality education and information booklets and brochures in cooperation with the MSU Extension Service. Examples include *Protecting Our Water Resources: Environmental Stewardship for Fertilizer Facilities*, *Relative Aquifer Vulnerability Evaluation (RAVE)*, and *Farm \*A\* Syst: a Farmstead Assessment System*. These documents are technical but readable information designed to teach basic hydrology and help the landowner/chemical user understand the factors and variables which can elevate certain chemical management practices to high risk levels, relative to ground water pollution potentials (fate and transport discussions).

The menu of tools available to the Agriculture Chemical Ground Water Protection Program is shown on the following pages.

**7. Incentives for Compliance.** According to program staff, a variety of incentives exist or could exist as the program is further developed.

**Agency-Generated.** Statute and Rules: The mere presence of a law prompts compliance. A number of factors influence the level of this compliance including how the laws and rules are viewed, the segment of the regulated community, and others. Most large businesses such as agricultural chemical manufacturers, large dealers, and commercial pesticide applicators probably try to comply with laws and see some incentive in terms of being good stewards and maintaining good records of compliance. Smaller operations, individuals, and certain culpable persons are probably less likely to comply merely because of the presence of a law. They may not be fully aware of the requirements or have difficulty in the expense of meeting requirements or understanding the law.

**Regulatory Presence:** The possibility of being investigated as the subject of a complaint is a powerful incentive for compliance. This is enhanced in the ground water program by the field offices which provide a local, readily accessible presence and by experienced staff who are able to identify violations, know how to obtain evidence, and who take an objective, professional approach to their duties.

**Inspections:** Routine inspections of persons subject to Specific Management Plans will provide additional regulatory presence and incentive for compliance. The details of this are yet to be worked

out.

**Penalties:** The ground water law provides a full range of penalties ranging from written warnings to license revocation or criminal sanctions. Many persons will comply because they want to keep a "clean record" and are concerned about the blemish associated with a violation and subsequent enforcement action no matter how severe. The possibility of a civil penalty is a financial incentive particularly among small businesses, farmers, and private persons to whom the civil penalty amounts authorized by statute can be substantial.

**Industry Incentives:** Industry provides a positive incentive for compliance when they encourage and support compliance with laws, when there is a cooperative approach between state regulatory agencies and these organizations in developing and implementing laws, and where the membership can see the positive relationship. Organizations that promote compliance in Montana include the Montana Agricultural Business Association, Association of Montana Aerial Applicators, Association of Montana Turf and Ornamental Professionals, and Montana Aviation Trades Association.

**Education:** While education may not, in a true sense, be an incentive to comply with the law, it is a way to make full use of other incentives. For example, education is an important way to inform people about the existence of the program, its details, and reasons for regulating agricultural chemicals. The individual will be more likely to comply once informed about the presence of the law and the penalties for noncompliance. Education also gives the department an opportunity to convince persons to comply with the law by discussing needs for the law and the consequences of noncompliance, including the detrimental effects from illegally used chemicals.

It should be pointed out that compliance among some culpable individuals is difficult no matter what the incentive. The department has had experiences with individuals who did not comply with the law for various reasons, whether because of political views or because the incentives were not there.



**STATE COMPLIANCE/ENFORCEMENT TOOLS -- AGRICULTURAL CHEMICAL GROUND WATER PROTECTION PROGRAM (ACGWP)**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/Technical Assistance Programs:</b>  Technical Seminars	Required of MDA by law to promote the policies set forth in the General Management Plan (GMP). Training and education services and programs to be conducted in cooperation with the MSU Extension Service.  Included as part of pesticide applicator training	MDA staff and MSU	ongoing  80
<b>Comprehensive Planning\withdrawals:</b>  -General Management Plan for Ground water Development  -Specific Management Plans	Required of MDA by the ACGWP Act to set forth general policy for protecting ground water. Provides for the development of Best Management Plans by rule. Unenforceable policy framework.  Required to be developed, adopted by rule and enforceable when: 1) A verified detection of an agricultural chemical is at or above 50% of a standard. 2) Monitoring indicates an increasing trend of the chemical presence. 3) Monitoring indicates that a chemical has migrated. 4) EPA proposes to suspend or cancel a chemical registration or prohibit or restrict a chemical's sale or use <b>unless</b> the state has an approved management plan in place for that chemical (a Federal Pesticide Specific Management Plan [PSMPI]), <b>OR</b> 5) An agricultural chemical that has the potential to leach is being used in a vulnerable area.	MDA Staff  MDA staff, chemical standards set by DEQ.	plan completed in 1995  none yet, standards not set in rules.
<b>Permits/Certifications/Bonds:</b>	None authorized. However, following adoption of SMPs, certification, training and licensing could be required for specific uses in specific areas under MCA Sec. 80-15-214 2(e)		

STATE COMPLIANCE/ENFORCEMENT TOOLS -- AGRICULTURAL CHEMICAL GROUND WATER PROTECTION PROGRAM (ACGWP)				
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)	
<b>Monitoring/Inspections:</b> -Ground water Monitoring  -Inspections	<p>Required of MDA generally statewide to determine ambient situation and specifically where agricultural chemical contamination could be likely.</p> <p>Upon presentation of Department credentials at reasonable times or under emergency conditions may enter private or public property to sample, review records, investigate violations.</p>	<p>MDA staff. MDA/MSU Laboratory</p> <p>field staff</p>	<p>410 samples. 590 analyses.</p> <p>86*</p>	
<b>Administrative Compliance Notices/Orders:</b> MCA 80-15-403  -Emergency Actions MCA 80-15-405	<p>Can be issued for violating an established ground water standard, or any other requirement of the Act.</p> <p>Must be issued in coordination with DEQ acting under the Water Quality Act. Compliance Orders issued by MDA precludes taking other enforcement actions for the same violation under the Pesticides Act or the Fertilizer Act. Among other things, Compliance Orders can require monitoring and cleanup of soils and ground water.</p> <p>Without notice or hearing, to protect ground water from contamination or to prevent use of impaired or likely to be impaired ground water; orders may be issued or specific rules may be adopted.</p>	<p>Bureau Chief, Division Admin., Director</p> <p>Director</p>	<p>0</p> <p>0</p>	
<b>Admin. Penalties/Sanctions:</b> MCA 80-15-412, maximum \$1000\offense except \$500 maximum for first offense by farm applicators under pesticide permit or for applying fertilizers.	<p>For violations of law and rule. Violator must be given notice and be provided with an opportunity for a hearing under the provisions of the Montana Administrative Procedures Act (MAPA).</p>	<p>Bureau Chief, Div Admin.</p>	<p>0.00</p>	

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- AGRICULTURAL CHEMICAL GROUND WATER PROTECTION PROGRAM (ACGWP)

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Civil Judicial Action:</b> MCA 80-15-413. maximum \$10,000 per violation -Injunctions Authorized MCA 80-15-404.	Only for violations of MCA 80-15-402: violating provisions of SMPs, violating orders issued under ACGWP Act, and/or violations of ACGWP Act.  Permanent or temporary for violations subject to compliance orders issued under the ACGWP Act.	Director, District Court  Director, District Court	0  0
<b>Criminal Judicial Action:</b>  -Criminal Misdemeanor MCA 80-15-414 maximum \$1,500; minimum \$100  -MCA 80-15-414 A) \$5,000 and/or 6 months imprisonment. B) \$5,000 and/or 1 year imprisonment.  Felony -MCA 80-15-414 maximum \$25,000 per day of violation and/or 1 year imprisonment. Subsequent violations at maximum of \$50,000 per day of violation and or 2 years imprisonment.	For violation of law or rules; also for obstruction of Department in performance of its duties under ACGWP Act.  A) For knowingly making false statements on required records or for tampering with required monitoring devices. B) For revealing confidential information required to be maintained under the law with an intent to defraud.  For intentional violations of above MCA 80-15-402. see "Civil Judicial Action."	Director, County Attorney  Director, District Court  Director, District Court	0  0  0

\*Includes pesticide program inspections that incorporated ground water program components

**8. History of Compliance.** The Agricultural Chemical Ground Water Protection Act (ACGWPA) became effective January 1, 1991, so it is relatively new. Most compliance activities will be linked to the development and implementation of Specific Management Plans (SMPs). Since no SMPs are currently in effect, there are no significant compliance activities to report. To date, the agency has not taken any enforcement actions under the ACGWPA. The MDA has addressed pesticide spills that have or could have affected ground water through action taken under the Montana Pesticides Act. However in these actions, the MDA has informed the violator of possible violations under the ACGWPA.

The ACGWPA requires that the Department of Environmental Quality, Board of Environmental Review adopt standards and, as applicable, interim numerical standards for agricultural chemicals in ground water. The MDA's development and enforcement of SMP's, issuance of orders, and other routine enforcement is contingent upon the DEQ Board's adoption of standards.

Currently, the MDA is investigating two fertilizer plants under the ACGWPA. In one case, ground water has been contaminated with nitrates/nitrites, and in the other case there appears to be a chance that ground water is or will be affected. These cases are being reviewed for appropriate action.

**9. "Violations."** As noted in the "tools" table, agricultural chemical users may be out of compliance if they violate the provisions set forth in a Specific Management Plan, if they violate the conditions of a Special Management Zone (SMZ), or if they contaminate ground water or create spills of chemicals which could likely contaminate ground water. Since the ACGWPA became effective, 4 administrative orders have been written requiring cleanup of pesticide spills, sampling of soils and ground water, and some soil removals. These orders were issued under the Montana Pesticides Act but made mention of possible violations of the ACGWPA. Significant violations of the ACGWPA are not formally defined in statute, rule or by a department policy strategy.

During the 1995 calendar year, the MDA issued no formal enforcement actions under the ACGWPA.

There are no pending or new violations of the ACGWPA.

**Discovery of Violations.** The agency anticipates that most violations of the ACGWPA will be discovered through routine inspections, tips and complaints, and Specific Management Plan reviews.

**10. Considerations in Calculating Penalties.** The ACGWPA Program uses a system to assess administrative civil penalties similar to that in the MDA's Pesticide Program. The Department has developed and adopted by rule a penalty matrix which specifies the range of penalty to be assessed for 1st, 2nd, and 3rd offenses of the ACGWPA law and rules. The statute specifies the maximum allowable penalties, and the matrix at ARM 4.11.914 sets forth the starting penalty amount. Like the Pesticides Act, the ACGWPA also requires the MDA to consider the gravity or seriousness of the violation, the degree of care taken by the offender, the degree of harm to humans, agriculture, or the environment, and the effect on a persons ability to stay in business prior to determining the amount of civil penalty to be assessed. Compliance history and frequency of violations are taken into consideration when selecting an appropriate enforcement action.

Beyond the above mentioned penalty matrix, the agency has not adopted any formal penalty calculation formula for determining penalties. Unlike the Pesticides Act, there is no statutory definition of what

constitutes a major or serious violation in the ACGWPA. Criteria for assessing judicial civil or criminal penalties is ad hoc. The program is also directed by statute to consider issuing warning letters or orders for minor violations if the public interest is better served than to report the violation for prosecution.

**11. Resolution of Noncompliances.** No enforcement actions have been issued under the Act to date. Ground water enforcement issues have been handled under the Montana Pesticides Act.

**12. Current Compliance Priorities.** The Department of Agriculture has identified the following compliance and enforcement priorities for the Agricultural Chemical Ground Water Protection Program.

Long-term:

- Monitor EPA's ground water regulations and prepare to initiate Specific Management Plans as needed following adoption of the federal regulations. Priority chemicals for SMPs will be determined by public input, chemical use patterns, volume of use, available alternatives and similar factors.
- Monitor ground water for pesticide residues; collecting samples from permanent monitoring wells and from other private or public wells. High priority sites for sampling are areas underlaid by vulnerable ground water (shallow, permeable soils) where agricultural chemicals are being used.
- Investigate agricultural chemical contamination and require remediation of sites with the potential for entering ground water. Sites for investigation and remediation will be prioritized by considering the type of chemical involved, level and extent of residues, ground water characteristics (depth, uses, quality), probability that ground water will become contaminated at levels approaching EPA's minimum concentration levels, and similar factors.
- Develop procedures and implement a program for routine inspections of the communities regulated under SMP's.

Short term:

- The adoption of standards for agricultural chemicals is necessary in the near future. Standards are the foundation upon which to base remediation orders and best management practices which are an integral part of SMP's.
- Public information and training about the ground water program, EPA's regulations, and specific management plan development.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** Approximately 11%, or \$66,700, of each of the FY 96-97 biennium budget years for the ACGWPA Program comes from an EPA grant. The MDA has a yearly cooperative agreement with the EPA which includes some task elements specific to the ACGWPA Program. These include ground water monitoring of 8 permanent sampling wells, continued compliance assistance efforts, and development of Ground Water Management Plans. The MDA is subject to mid-year and year-end program reviews by the EPA. The Act specifically states that the rules adopted under the program can be no more stringent than federal rules or guidelines except under specifically allowed circumstances.

**Partnerships.** The MDA, ACGWP Program has several partnerships in effect with other Montana agencies. Most notable is the relationship with the Department of Environmental Quality (DEQ), Water

Quality Division. Because of the ground water contamination prevention goals of the MDA program and the DEQ water quality programs, the ACGWPA and the legislation's Statement of Intent make it clear that the 2 agencies are to work together cooperatively at every convenience. The DEQ Board of Environmental Review is defined in the ACGWPA and legislatively directed to adopt ground water standards for agricultural chemicals for use by both agencies. The DEQ, Board of Environmental Review is also authorized in the ACGWPA to adopt rules for administrative penalties, field sampling and laboratory quality assurance documents, and ground water sampling procedures. The MDA and DEQ are directed to cooperate on the classification of ground water, in issuing compliance orders, and taking other enforcement actions (administrative civil, and judicial civil and criminal penalties).

The MDA also works closely with the Montana State University Extension Service (MSUES) in its efforts to implement the ACGWPA Program. The law requires that MDA and MSUES cooperate in developing training and education tools for the program.

The MDA is directed to work with DEQ, the Bureau of Mines and Geology, and others to promote ground water research and data management efforts.

**Delegated Authority.** The Montana Department of Agriculture retains all authority to develop General Management Plans and Specific Management Plans for the use of agricultural chemicals in Montana. There is no statutory authority to delegate duties and responsibilities to local governments.

# MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

The Department of Environmental Quality (DEQ) is responsible for regulating air quality, water quality, underground storage tanks, automobile wrecking facilities, hazardous waste facilities, solid waste management systems, mining operations, and for siting and needs analyses for large-scale energy facilities. In addition, the department is the lead agency for reclamation and cleanup activities related to the federal and state superfund programs, leaking underground storage tanks, and regulation and permitting of mining conducted on private, state, and federal lands. Department divisions, and fiscal and staffing resources, are shown below.

<u>Bureau/Division</u>	<u>Budget</u>		<u>Staff (FTEs)</u>	
	<u>FY 96</u>	<u>% of Total</u>	<u>FY 96</u>	<u>% of Total</u>
Director's Office	\$100,000	0.3	0	0
Central Services	1,752,000	5.6	28.0	7.6
<b>Air Quality Division</b>	<b>3,550,000</b>	<b>11.4</b>	<b>58.0</b>	<b>15.8</b>
<b>Environmental Remediation Division</b>	<b>4,196,000</b>	<b>13.5</b>	<b>34.2</b>	<b>9.3</b>
<b>Water Quality Division</b>	<b>5,945,000</b>	<b>19.2</b>	<b>76.3</b>	<b>20.8</b>
Petroleum Tank Release Compensation Board	1,347,000	4.3	24.3	6.6
<b>Waste Management Division</b>	<b>3,567,000</b>	<b>11.5</b>	<b>46.8</b>	<b>12.8</b>
Central Services - Natural Resources	612,000	2.0	11.5	3.1
<b>Energy Division</b>	<b>1,952,000</b>	<b>6.3</b>	<b>33.0</b>	<b>9.0</b>
Central Management Program - Reclamation	133,000	0.4	3.0	0.8
Reclamation Program	<u>7,867,000</u>	<u>25.4</u>	<u>51.4</u>	<u>14.0</u>
<b>TOTAL</b>	<b>\$31,020,000</b>	<b>100.0</b>	<b>366.6</b>	<b>100.0</b>

source: LFA, 1995

## AIR QUALITY DIVISION

The Air Quality Division has two bureaus: 1) Air Quality and, 2) Occupational and Radiological Health. The Air Quality Bureau is responsible for maintaining outdoor air quality levels considered safe for the public's health and welfare through permit review, inspections, monitoring State Implementation Plan (SIP) development for areas not attaining ambient air quality standards, and the dissemination of information. The Occupational and Radiological Health Bureau is responsible for: 1) administering the Radiological Health Program, with primary emphasis on inspection of x-ray machines; 2) the regulation of asbestos consultants, contractors, and workers; and 3) the provision of measurement and technical expertise to evaluate indoor air in homes and work places.

The program summary analyzes the outdoor air quality compliance and enforcement components of the division.

5301 03 00000 DEPT OF ENVIRONMENTAL QUALITY Program Summary		AIR QUALITY DIVISION						
Budget Item	Base Budget Fiscal 1994	PL Base Adjustment Fiscal 1996	New Proposals Fiscal 1996	Total Leg. Budget Fiscal 1996	PL Base Adjustment Fiscal 1997	New Proposals Fiscal 1997	Total Leg. Budget Fiscal 1997	Total Leg. Budget Fiscal 96-97
FTE	50.53	3.00	4.50	58.03	3.00	4.50	58.03	58.03
Personal Services	1,437,698	537,203	114,248	2,089,149	546,057	114,286	2,098,041	4,187,190
Operating Expenses	586,918	359,757	177,056	1,123,731	362,542	196,959	1,146,419	2,270,150
Equipment	36,069	0	26,840	62,909	0	0	36,069	98,978
Grants	229,110	45,598	0	274,708	82,433	0	311,543	586,251
Total Costs	\$2,289,795	\$942,558	\$318,144	\$3,550,497	\$991,032	\$311,245	\$3,592,072	\$7,142,569
<b>Fund Sources</b>								
General Fund	233,015	135,191	(9,854)	358,352	138,454	(9,925)	361,544	719,896
State/Other Special	954,529	872,659	202,751	2,029,939	1,125,321	175,489	2,255,339	4,285,278
Federal Special	960,803	76,156	125,247	1,162,206	(131,295)	145,681	975,189	2,137,395
Proprietary	141,448	(141,448)	0	0	(141,448)	0	0	0
Total Funds	\$2,289,795	\$942,558	\$318,144	\$3,550,497	\$991,032	\$311,245	\$3,592,072	\$7,142,569

source: LFA, 1996.

## Air Quality Program

The Air Quality Program implements National Clean Air Act regulations and is responsible for administering the Clean Air Act of Montana. Specifically, the program is responsible for maintaining ambient (outdoor) air quality levels for the public's health through permit review, inspections, monitoring, and information dissemination.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Air Quality Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II, Sec. 3** "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment..."
- **Montana Clean Air Act (MCA 75-2-101, et. seq.)** makes it public policy to protect Montana's air quality.
- **Asbestos Control Act (MCA 75-2-501, et. seq.)**
- **Nuclear Radiation (MCA 75-3-101, et. seq.)**
- **Occupational Health Act (MCA 50-7-101, et seq.)**

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act (MCA 75-1-101, et seq.)**

Related federal authorities:

- **National Clean Air Act (42 U.S.C. 7401, et. seq.)**
- **National Environmental Policy Act (NEPA)**

Air quality administrative rules:

- **ARM 16.8.101 et. seq.**

Specific enforcement authority:

- **MCA 75-2-401, 412, 413, and 514**
- **ARM 16.8.201, 202**

Primacy/jurisdictional agreements:

- State program approval and primacy from the federal Environmental Protection Agency
- Enforcement authority for minor sources has been delegated to 3 counties through annual contracts and funding.



**2. Program Goals.** The Air Quality Program goal is to ensure compliance with the air quality laws and to administer the program through a systematic and predictable process that not only provides protection to the citizens of Montana and their environment but also serves to deter individuals from violating those same laws and rules.

**3. Program Activities.** The Compliance and Enforcement Section of the program has ten positions dedicated to the air quality compliance/enforcement functions. Approximately 10-15% of their duties are specifically related to enforcement. However, the entire staff of the Air Quality Program has limited duties related to compliance and enforcement. Historically, this program processes approximately 75 new source or construction air quality permits and 100 burning permits per year.

Program resources and demands are described in more detail below. Please note, given the reorganization transition that is taking place, the numbers depicted below are approximations.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Permits/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
Permitting	\$773,360	16	4.4 years	320	NA	unkwn
Enforcement	\$483,350	10	5 years	10 active cases	NA	unkwn
Other <sup>1</sup>	\$2,293,787	32	unkwn	NA	NA	NA
<b>TOTAL</b>	<b>\$3,550,497</b>	<b>58</b>	<b>&gt; 5yrs</b>	<b>-</b>	<b>NA</b>	<b>unkwn</b>

source: Booher & Sensibaugh, 1996.

<sup>1</sup> Other includes planning staff, monitoring staff, administrative staff, occupational and radiological health staff and program, equipment, etc. These positions support the permitting and enforcement activities.

**Fees and Charges.** Air Quality Program revenues from fees and charges are described below. Air Quality operation fees are collected annually from each permittee based on tonnage emitted. The Board of Environmental Review may order the assessment of additional air quality operation fees to fund specific activities of the department directed at a particular geographic area. Air quality permit application fees are based on the estimated amount of air pollutants to be emitted annually from the source of air contaminants.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fee:	variable	\$25,000	<sup>1</sup>
Operation Fees:	variable	\$1,500,000	<sup>1</sup>
Additional MEPA Fees	none	none	not applicable
Noncompliance Penalties:	variable	\$300,000	General Fund
<b>TOTAL:</b>	<b>NA</b>	<b>\$1,645,437</b>	

source: Booher & Sensibaugh, 1996

<sup>1</sup> Concurrent with the submittal of a permit application and annually for the duration of the permit, the applicant shall submit to the department a fee sufficient to cover the reasonable costs, direct and indirect, of developing and administering the permitting

requirements, including:

- (a) reviewing and acting upon the application;
- (b) implementing and enforcing the terms and conditions of the permit. This amount does not include any court costs or other costs associated with an enforcement action. If the permit is not issued, the department shall return this portion of the fee to the applicant.
- © emissions and ambient monitoring;
- (d) preparing generally applicable regulations or guidance;
- (e) modeling, analysis, and demonstrations;
- (f) preparing inventories and tracking emissions;
- (g) providing support to sources under the small business stationary source technical and environmental compliance assistance program; and
- (h) all other costs required to be recovered pursuant to Subchapter V of the federal Clean Air Act, 42 U.S.C. 7661, et seq.

**4. Regulated Communities.** Administrative rules require most emission sources to apply for air quality permits prior to construction, alteration, installation, or use of any air contaminant source or stack. Those entities that are regulated are illustrated below.

The Regulated Community				
Type of Industry	Major <sup>1</sup>	Synthetic Minor <sup>2</sup>	Minor <sup>3</sup>	Total
Oil and Gas	29	2	50	81
Mineral Processing	65	2	52	119
Wood Products	37	1	2	40
Agricultural	13	1	2	16
Mining	29	0	3	32
Power Generation	6	0	3	9
Misc.	52	3	27	82
Total	283	9	139	431

<sup>1</sup> "Major" sources are generally those sources that emit greater than 100 tons of air pollution per year.

<sup>2</sup> "Synthetic Minor" are those sources that could emit more than 100 tons of air pollution per year but are controlled to emit less than 100 tons of air pollution.

<sup>3</sup> "Minor" sources of air pollution are all other sources that are not major or synthetic minor.

**5. Philosophical Approach to Compliance.** The program's philosophical approach is to maintain compliance. Program efforts are cooperative with the regulated industry. Compliance assistance is the top priority. When cooperation is no longer effective in maintaining compliance, the program will use its enforcement authority.

**6. Compliance Tools Available and Used.** The program provides compliance assistance to the regulated community and ensures compliance through inspections and enforcement actions. The Air Quality Program is unique in that it is required to establish a small business stationary source technical and environmental compliance assistance program pursuant to the federal Clean Air Act. The small business compliance assistance program must:

- (a) provide information to small business stationary sources on compliance methods and

technologies, pollution prevention, and accidental release detection and prevention;

(b) assist small business stationary sources in determining applicable requirements under this chapter and in receiving permits in a timely and efficient manner;

© provide small business stationary sources timely notice of their rights and obligations under this chapter;

(d) provide information to small business stationary sources regarding the availability of audit services that are useful for determining compliance status with the requirements of this chapter; and

(e) perform other duties as may be necessary to meet the requirements of the federal Clean Air Act, 42 U.S.C. 7401, et seq.

The table on the following pages illustrates the compliance tools available and used by the Air Quality Program.

STATE COMPLIANCE/ENFORCEMENT TOOLS -- AIR QUALITY			
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Info/T.A.:			
Presentations	When requested.	Program Staff	unkwn
Informal Discussions	When dealing with regulated community and general public.	Program Staff	unkwn
On-Site Technical Assistance	When dealing with regulated facilities.	Program Staff	unkwn
Small Business Compliance Assistance Program Education Efforts:			
General Assistance	The small business assistance program proactively provides general assistance through the use of a 1-800 phone number, referrals, and solicitation.	Small Business Representative	1044
On Site Visits	Upon request or referrals.	Small Business Representative	78
Seminars	When a new law is enacted or rule is promulgated, the small business representative organizes a training program. The small business representative also participates in seminars provided by other entities.	Small Business Representative	54
Information Packets	Upon request.	Small Business Representative	29
Comprehensive Planning/Withdrawals:	Not authorized.	Not applicable	Not applicable

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- AIR QUALITY

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Permits/Certifications/Bonds:</b>  Permits:	Sources that emit greater than 25 tons of air pollution with certain exclusions are required to obtain a permit.	Program staff	120
<b>Monitoring/Inspections:</b>	Inspections are scheduled annually. Inspections are also triggered by complaints.	Program staff	110
<b>Administrative Notices/Orders:</b>  Warning letter/ Letter of Resolution (LOR)  Citation/Notice of Violation (NOV)	Warning letters and LOR's are used to notify a facility or individual of a violation or to resolve a violation after an official notice (NOV) has been sent. They are used for de minimis violations or those that do not proceed to "formal" enforcement action.  NOV's are issued when a noncompliance situation has the potential for proceeding to "formal" enforcement action. It is an official notice that the department believes that a violation of an applicable requirement has occurred or is occurring. It allows the alleged violator an opportunity to meet with representatives of the department and discuss the violation(s). The NOV is a prerequisite for Administrative resolutions. Citations are no longer used by the AQD and have been replaced by NOV's	Issued by staff  NOV's are issued by staff.	55  73

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- AIR QUALITY

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Release of Liability	Release of Liability is a form of administrative resolution to a violation. When a violation has a small associated penalty (i.e. less than \$7,000), the litigation risk is low and the violator has been cooperative and agrees with the resolution, a release is considered. The violator pays the proposed penalty and the department issues a release of liability signed by the director. The use of releases is new to the AQD.	Issued by management or legal staff and signed by director	2
Administrative Order	An Administrative Order is a legal document which contains orders from the department for resolving violations and can contain a penalty. The document is presented as a proposal and is negotiable. The final form is appealable to the Board of Environmental Review. The use of Administrative Orders is dependent upon the cooperativeness of the violator, a one year statute of limitations from the date of the violation and a penalty cap of \$80,000. Administrative penalty authority was granted to the AQD by the 1993 Legislature.	Drafted by management with legal staff oversight, issued by management and signed by director.	4  No board appeals
Administrative Penalties/Sanctions:  Penalties:	A penalty may be assessed if a statutory provision, an administrative rule, or a permit condition or limitation is violated and the facts alleged to constitute a violation. An administrative civil penalty of not more than \$10,000 for each day of each violation, not to exceed a total of \$80,000. If an order issued by the board under this section requires the payment of an administrative civil penalty, the board shall state findings and conclusions describing the basis for its penalty assessment. Administrative penalties collected must be deposited in the state general fund.	Drafted by management with legal staff oversight, issued by management and signed by director.	4 <sup>1</sup>
Civil Judicial Action:	A civil judicial action is taken when a violator has been uncooperative, or litigation risk is high or the penalty is calculated higher than \$80,000.	Issued by legal staff. Approved by the Director.	5

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- AIR QUALITY

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Criminal Judicial Action:</b>	<p>Criminal judicial action is invoked if a person is guilty of an offense if that person knowingly:</p> <ul style="list-style-type: none"> <li>(1) violates a provision of statute or a rule, order, or permit made or issued;</li> <li>(2) makes a false material statement, representation, or certification on a required form or in a notice or report required by a permit; or</li> <li>(3) renders inaccurate a required monitoring device or method.</li> </ul> <p>A person guilty of an offense is subject to a fine of not more than \$10,000 per violation or imprisonment for a period not to exceed 2 years, or both. This offense must be classified as a misdemeanor. Each day of each violation constitutes a separate violation. Fines collected under this section, except fines collected by an approved local air pollution control program, must be deposited in the state general fund.</p>	District Court	none

<sup>1</sup> The four administrative penalties assessed in 1995 were attached to administrative orders.

source: Booher, 1996.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with air quality statutes and rules are the small business compliance assistance program, periodic inspections and self submitted compliance reports, stack testing, ambient monitoring, and citizen complaints.

**8. History of Compliance.** The Air Quality Program provided the following narrative on its compliance history between July 1994 and February 1996. The program was unable to provide any information on compliance history for actions taken prior to July 1994. In the period between July 1994 and February 1996:

- 73 total citations/Notice of Violations (NOVs) were issued by the AQD
- 22 were issued to asphalt plants and crushers for violations of federal testing regulations--all of them were resolved through compliance assistance and warning letters.
- 17 were issued to violators of the open burning regulations - most of these were resolved through warning letters - some of them are recent and have yet to be officially resolved
- 26 were issued to 15 Major Stationary Sources (those that emit more than 100 tons per year) - some of these were duplicates, issued for different violations or duplicated because an NOV was issued to replace a citation. 10 citations/NOVs representing 7 facilities have been resolved. 16 citations/NOVs representing 8 facilities are ongoing.
- 8 citations/NOVs representing 6 minor facilities (those emitting less than 100 tons per year) were issued - 6 of those violations have been resolved - 2 are ongoing.

The 22 asphalt plant/crusher NOV's and the resolution to those was a special compliance assistance effort and is also not included on this list.

source: Booher, 1996.

## **9. "Violations."**

The FY 95 list of air quality violations (both issued and pending) is shown below.

<b><u>1995 Air Quality Violations, by Type and Status</u></b>					
<b><u>Month Issued</u></b>	<b><u>Type of Operator</u></b>	<b><u>Desc. of Violation</u></b>	<b><u>Penalty Assessed</u></b>	<b><u>Status at Year End</u></b>	<b><u>Significant<sup>1</sup> Violation?</u></b>
October	Major	Failure to obtain a permit.	\$5,000	resolved	yes
October	Major	Failure to obtain a permit and	\$9,955 <sup>2</sup>	resolved	yes
		failure to conduct compl. testing			
October	Major	Failure to obtain a permit and	\$29,388 <sup>3</sup>	resolved	yes
		failure to conduct compl. testing			
October	Major	Opacity violation	\$8,500	resolved	yes
November	Major	Violated consent decree	\$1,250	resolved	yes
March	Major	Failure to conduct testing	\$1,178	resolved	yes
March	Major	Emission violation	\$10,000	resolved	yes



May	Major	Opacity violation	\$10,000	resolved	yes
July	Major	Failure to obtain permits	\$79,000	resolved	yes
July	Major	Emissions and opacity violations	\$425,000	resolved	yes

<sup>1</sup> A significant violation in generic terms is one in which a major source of air pollution (a source that emits greater than 100 tons of air pollution per year) violates a federally enforceable regulation.

<sup>2</sup> In addition to the penalty, a supplementary environmental project valued at \$110,000 was imposed through an administrative order.

<sup>3</sup> In addition to the penalty, a supplementary environmental project valued at \$110,000 was imposed through an administrative order.

source: Booher, 1996.

**Discovery of Violations.** Most violations in the Air Quality Program are discovered through inspection and investigation as shown below.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
Major	15	11	7	7	-
Minor	7	1	-	2	6

The above table does not include open burning violations which were all discovered through complaints.

source: Booher, 1996.

**10. Considerations in Calculating Penalties.** The Air Quality Program uses a detailed "point" system outlined in its cooperative enforcement agreement with the EPA to assess penalties. Generally, points are assigned based on history, seriousness, negligence, and good faith, as described below.

**11. Resolution of Noncompliances.** According to program staff, 95% of the total violations are resolved informally through site visitation and consultation, warning letters, etc. Program staff were unable to provide a figure for total violations over time given that most violations are informally resolved. There are 10 current formal enforcement cases that the program is pursuing at this time. Four are being resolved administratively. Two are being resolved through civil/judicial actions. And for 4 cases the method of resolution has not yet been determined.

**12. Current Compliance Priorities.** Compliance priorities were not provided.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** Not applicable.

**Partnerships.** The Air Quality Program cooperates on an informal basis with other state agencies concerning enforcement issues. The Air Quality Program has a formal enforcement agreement with the EPA. This agreement establishes procedures and time lines for conducting enforcement actions.

**Delegated Authority.** The state Air Quality Program delegates some of its authority for nonmajor sources to local governmental entities.

## ENERGY DIVISION

The Energy Division consists of an administration unit and three bureaus: 1) the Facility Siting Bureau, which does research, performs environmental impact and assessment studies, and analyzes energy projects under either MFSA or MEPA; 2) the Planning and Analysis Bureau, which identifies and evaluates energy issues affecting Montana and formulates recommendations for Montana officials; and 3) the Conservation and Renewable Energy Bureau, which works to encourage energy conservation and reduce the state's dependence on fossil fuels through the promotion of competitively-priced renewable resources.

5301 26 00000								
DEPT OF ENVIRONMENTAL QUALITY				ENERGY DIVISION				
Program Summary								
Budget Item	Base Budget Fiscal 1994	PL Base Adjustment Fiscal 1996	New Proposals Fiscal 1996	Total Leg. Budget Fiscal 1996	PL Base Adjustment Fiscal 1997	New Proposals Fiscal 1997	Total Leg. Budget Fiscal 1997	Total Leg. Budget Fiscal 96-97
FTE	36.00	(1.00)	(2.00)	33.00	(1.00)	(2.00)	33.00	33.00
Personal Services	1,105,651	202,171	(71,553)	1,236,269	208,616	(72,102)	1,242,165	2,478,434
Operating Expenses	350,366	199,003	0	549,369	177,061	0	527,427	1,076,796
Equipment	33,608	(22,616)	0	10,992	(21,616)	0	11,992	22,984
Capital Outlay	250,424	(250,424)	0	0	(250,424)	0	0	0
Grants	275,758	(125,758)	0	150,000	(125,758)	0	150,000	300,000
Debt Service	4,630	414	0	5,044	414	0	5,044	10,088
Total Costs	\$2,020,437	\$2,790	(\$71,553)	\$1,951,674	(\$11,707)	(\$72,102)	\$1,936,628	\$3,888,302
Fund Sources								
General Fund	483,647	108,493	0	592,140	108,425	0	592,072	1,184,212
State/Other Special	311,975	183,284	0	495,259	144,893	0	456,868	952,127
Federal Special	900,628	35,200	(71,553)	864,275	59,162	(72,102)	887,688	1,751,963
Expendable Trust	324,187	(324,187)	0	0	(324,187)	0	0	0
Total Funds	\$2,020,437	\$2,790	(\$71,553)	\$1,951,674	(\$11,707)	(\$72,102)	\$1,936,628	\$3,888,302

source: LFA, 1995.

## Legislative History

Events important to the compliance/enforcement elements of the Energy Program are summarized below.

### Montana Utility Siting Act

**1973** The Montana Utility Siting Act of 1973 was enacted by the 42nd Legislature to ensure that the location, construction, and operation of power and energy generating and conversion facilities would produce minimal adverse effects on the environment and the citizens of Montana.

The Act covered certain facilities that generated electricity, produced gas or liquid hydrocarbon products, or that enriched uranium minerals. It also covered electric transmission lines of a defined capacity and length, along with their associated facilities.

The Act required an application for the proposed facility; a filing fee; a study, evaluation, and report; a public hearing process; and certification from the Board of Natural Resources and Conservation (BNRC) prior to construction. It also required the annual filing of a long-range plan that included a list of planned facilities.

- 1974 The 43rd Legislature amended the Utility Siting Act to include provisions for facilities for the development and use of geothermal energy.

### Montana Major Facility Siting Act

- 1975 The 44th Legislature changed the name of the Utility Siting Act to the Montana Major Facility Siting Act and made a number of comprehensive changes. It expanded the Act's coverage to include:
- facilities producing synthetic fuels; facility additions costing more than \$250,000; smaller electrical production facilities, and facilities which could utilize, refine, or convert 500,000 tons or more of coal or more per year;
  - added the consideration of "public interest, convenience, and necessity;"
  - allowed a waiver of certification proceedings if an immediate, urgent need for a facility exists;
  - added provisions stating when the BNRC may revoke or suspend a certificate; and
  - placed the burden of proof on the applicant during the hearing.
- 1977 The 45th Legislature enacted a provision offering a reduction in the statutory filing fee upon timely submission of a notice of intent to file an application.
- 1978 An initiative passed in 1978 amended the Act to require the BNRC to find that a number of conditions are met before a nuclear power plant may be certified. The voters of the state must then approve the facility either by referendum or initiative.
- 1979 The 46th Legislature amended a number of substantive and procedural sections of the Act to clarify the schedule the state must follow in evaluating and reaching a decision on applications. Particular attention was given to the jurisdictions of the Department of Natural Resources (DNRC) and the Department of Health (DHES). Among other modifications, the Legislature:
- required applicants to file a joint application with both departments;
  - allowed the BNRC and BHES hearings to be combined at the applicant's request;
  - assigned specific time limitations to most phases of the hearing process;
  - declared the BHES decision on air and water quality conclusive, but retained BNRC's authority to determine that a site represents the minimum adverse environmental impact;
  - allowed conditional air and water quality permits to be issued, and primary and alternative sites to be certified by the BHES or DHES;
  - established time limits for the commencement of construction on transmission lines and pipelines;
  - exempted crude oil and natural gas refineries and associated facilities from the Act;
  - directed use of public lands whenever such use is as economically practicable as the use of private lands and meets environmental criteria specified by the Act.
- 1981 The 47th Legislature also amended the Act. Along with other minor changes, the Legislature:
- allowed the BNRC to waive the alternative site studies in counties that have experienced severe unemployment problems;
  - enabled the BNRC to adopt rules that may exempt, in certain instances, facilities engaged in innovative energy technologies.
- 1983 The 48th Legislature amended the Siting Act to delete the provision exempting federal facilities from its coverage and inserted language that states the Act applies to federal facilities to the fullest extent allowed by federal law.
- 1985 The 49th Legislature amended the Siting Act to:
- extend coverage to natural gas or crude oil pipelines of more than 17 inches in diameter;
  - allow the BNRC to condition a certificate upon actual load growth reaching a specified level or on availability of other planned energy resources;
  - require that a plan for monitoring construction of certified facilities be included in the certificate;
  - exempt electric transmission lines of 230 KV or less from the requirement that they be identified in a

long-range plan at least two years prior to acceptance of an application by the DNRC;

- set new time limits for when construction on a facility must begin after a certificate has been issued;
- change the date for filing long-range plans, change the amount of filing fee paid for processing applications, allow the DNRC to collect reasonable costs for processing a proposal for an exempt facility, and provide for hearings on the revocation or suspension of certificates.

1987 The 50th Legislature made several changes to the Siting Act:

- Facilities certified under the Act were exempted from certain provisions of the dam safety law.
- A 60 day decision-making time was added to the DNRC determination on a centerline for linear facilities after the start of the non-contested case hearing.
- The kilovolt threshold for defining a transmission line for coverage was amended to exclude transmission lines larger than 69-kV and up to and including 115-kV from the Act if certain conditions were met, including right-of-way agreements or options from 75% of the owners who collectively own more than 75% of the property along the centerline; provide certain public notification requirements for project owners be supplied to the DNRC and for owners to submit verification within 36 months of the notice to the DNRC that provision had been met to exclude the project from coverage.
- Eliminated baseline study requirements in applications for energy generation and conversion facilities except at the applicants option; clarifying board rule-making authority; and made minor wording changes.

1989 No changes to the Siting Act were made during the 51st Legislature.

1991 No substantive changes to provisions of the Siting Act were made during the 52nd Legislature.

1993 The 53rd Legislature passed the Montana Integrated Least-Cost Resource Planning and Acquisition Act which integrated the Least-Cost Resource Planning under the Public Service Commission (PSC) into the Siting Act by providing the DNRC with a planning function. The changes provide for the DNRC review and comment on integrated resource plans or their equivalent submitted to the PSC.

1995 The 54th Legislature reorganized several state agencies, giving responsibility for the Siting Act to the new Department of Environmental Quality (DEQ). It also generally revised the Act by providing a two year change in the coverage of the Act for certain electric generating facilities, requiring DEQ to submit proposed legislation for modernizing and updating the law, and reducing time-frames for Board of Environmental Review (BER) decisions. Except for hydroelectric power generation facilities, the changes raised the trigger for coverage from generating 50 MW to generating 150 MW or more of electricity. These changes will terminate on June 30, 1997 unless extended by the Legislature. The changes would apply to all projects who have filed completed applications for applicable air and water quality permits between May 1, 1995 and June 30, 1997; have filed applications during this period and received approval by October 1, 1997; or have commenced to construct or upgrade a power plant designed for or capable of generating less than 150 MW. The DEQ must submit to the 1997 Legislature a report with recommendations for improving and modernizing the Act based on a consensus building process involving a broad range of affected interest groups. Decision-making time for the BER was reduced from 9 months to 8 months with reduction in times given for action by the hearing examiner under section 75-20-220 MCA.

# Energy Program

The Major Facility Siting Act, 75-20-101 et. seq, MCA requires that the Facility Siting Bureau within the Energy Program review the location, construction and operation of large energy generation plants and transmission facilities.

**1. Constitutional and Statutory Goals.** The following provides a general guide to the constitutional, statutory, federal, and rule for the activities of the Energy Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II, Sec. 3, Inalienable Rights** - conveys the right of every Montanan to a clean and healthful environment.
- **Montana Constitution, Art. II, Sec. 8, Right of Participation** - states that the public has a right to expect governmental agencies to provide reasonable opportunities for citizen participation in the operation of the agencies.
- **Montana Constitution, Art. IX, Sec. 1, Protection and improvement of the environment and natural resources** - subpart (1), requires the state to maintain and improve a clean and healthful environment in Montana for present and future generations. Subpart (3) requires the legislature to protect environmental life support system from degradation and provide remedies to prevent unreasonable depletion and degradation of natural resources.

- **Montana Major Facility Siting Act (75-20-101 et seq., MCA)** provides for state review of the location, construction, and operation of large energy generation plants and transmission facilities. 75-20-102(1) repeats and affirms the constitutionally declared policy of the state to maintain and improve a clean and healthful environment, and to provide for administration and enforcement to attain these objectives.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act (MCA 75-1-101, et seq.)**

Related federal authorities: None

Energy administrative rules:

- ARM 36.7.901 - 5004

Specific enforcement authority:

- 75-20-408, MCA

Primacy and jurisdictional agreements:

**2. Program Goals.** Based upon the above-referenced guidance, the Energy Program has identified the following program goals:

1. To administer the Major Facility Siting Act (MFSA), which regulates the location, construction, and operation of large scale energy facilities.
2. To adopt or revise MFSA rules, provide pre-application consultation to prospective facility sponsors, and, within established statutory time frames, evaluate and process applications for certificates of environmental compatibility and public need.
3. To serve as principal environmental assessment team for the Department and when requested, assist other Montana state government agencies in complying with the Montana Environmental Policy Act (MEPA) and other state statutes.
4. To prepare legally complete environmental analyses and impact statements for other divisions and agencies pursuant to MEPA and other state statutes such as the Strip and Underground Mine Reclamation Act, the Hardrock Reclamation Act, and the Water Use Act, within contractual and statutory time frames.
5. To coordinate and streamline joint state/federal review and decision-making on MFSA and MEPA projects through existing Memoranda of Understanding.
6. To form state/federal interagency teams and prepare joint environmental impact statements on MFSA projects proposed on federal lands or federal projects requiring substantive compliance with MFSA.

**3. Program Activities.** The MFSA/MEPA program in the Energy Division is described in the following table.

<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg Staff Exp</u>	<u>95 Ongoing Projects</u>	<u>Avg Acres/project</u>	<u>New Proj/yr</u>
\$564,920	11 auth. 7 actual	10 years	7	340	5

The Energy Division is authorized 5 current level positions, 3 modified positions and 3 aggregate positions to carry out MFSA and MEPA permitting, compliance and enforcement activities. The modified and aggregate positions depend on fees for funding; therefore, they are only filled when there is sufficient project revenue and work. Aggregate positions allow the Energy Division to expand as necessary to respond in a timely manner to applications. The actual staff level currently is 7 FTE.

**Fees and Charges.** Energy Program revenues from fees and charges are described below. The fee structure is established at 75-20-215. The fee formula is used as a statutory cap. The project sponsor is only billed for actual expenses. The DEQ usually enters into a fee agreement with applicants on the basis of estimated project costs.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Filing Fee	% of Project Cost <sup>1</sup>	\$349,800	development of studies/baseline data, writing

<sup>1</sup> The fee may not exceed the following scale based upon the estimated cost of the facility:

1. 4% of any estimated cost up to \$1 million; plus
2. 1% of any estimated cost over \$1 million and up to \$20 million; plus
3. 0.5% of any estimated cost over \$20 million and up to \$100 million; plus
4. 0.25% of any amount of estimated cost over \$100 million and up to \$300 million and up to \$1 billion; plus
5. 0.05% of any amount of estimated cost over \$1 billion

It is estimated that project fees will amount to \$349,805 in FY 96. The fees are used to accomplish studies and prepare environmental documents in support of the certification process.

**4. Regulated Communities.** Consistent with the activities noted above, the Energy Program interacts with project sponsors. Project sponsors include public, investor-owned utilities, federal power marketing agencies, independent, private power producers, and rural electric cooperatives. Industry representatives who are contemplating a proposed facility contact the DEQ to describe their concept and obtain information on the permitting process they can anticipate. It is the regulated community's responsibility to initiate contact with the department.

**5. Philosophical Approach to Compliance.** The Major Facility Siting Act tends to front-end load a host of preapplication activities. The early beginning of a working dialogue between the department and the project sponsor tends to encourage compliance. Early and meaningful public participation tends to provide advanced notice of potential problems in proposals, and provides the agencies and the project sponsor an opportunity to address public concerns.

**6. Compliance Tools Available and Used.** The menu of tools used by the Energy Program to achieve their natural resource/environmental mandates is shown below.

The Major Facility Siting Act program relies on the following compliance tools:

- Detailed, published rules describing the types of facilities covered and the specific information required in applications
- Pre-application consultation between the DEQ and prospective applicants to clarify and tailor application requirements
- Interagency agreements, contracts, and memoranda of understanding to provide cooperative data gathering to meet the regulatory needs of all agencies with jurisdiction applicable to the proposed project.
- Reviews to determine completeness of preliminary draft applications
- Meetings between an interagency team and the applicant to clarify deficiencies in the draft application
- Formal review of final applications and preparation of a letter to notify applicants of additional information needs
- Development of formal recommendations and proposed mitigation measures that the Board may include, or conditions when approving the proposed project
- Cooperative development with the applicant of environmental specifications for each project
- Contested case certification hearings before the Board of Environmental Review
- Performance bonds by the certificate holder to ensure post construction clean up and restoration, and longer term revegetation and weed control
- Board approved construction monitoring programs; DEQ identification of problematic practices in the field and in writing; follow up field inspection
- DEQ revegetation/reclamation monitoring; bond release when published revegetation/reclamation criteria are met
- Rarely, convening of technical working group to address long term mitigation of unanticipated impacts (see Table C)
- DEQ involvement in operational monitoring programs for compliance with certificate conditions that may include: self monitoring and reporting by certificate holder, review and approval of annual monitoring reports by DEQ, and identification of efforts or measures by DEQ to maintain compliance or prevent or avoid situations of noncompliance with certificate conditions. These efforts or measures may include: modification of operations, replacement of equipment, or remediation of identified problems.
- DEQ review and approval of certified facility de-commissioning plans or practices.

The DEQ staff monitors industry developments to ensure that projects requiring review are brought before it. Staff review of application materials identifies additional information requirements. When necessary the DEQ participates in contested case certification hearings either as an active party or as staff to the board. The staff ensures that the project's environmental documentation satisfies legal requirements and works with the applicant to ensure that the board's project-specific version of the board's environmental specifications are incorporated into construction documents. Finally, DEQ staff members monitor or supervise the monitoring of project construction. They ensure that the board's mitigation requirements are complied with, and provide feedback to the board and DEQ management on the effectiveness of mitigation measures.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- ENERGY PROGRAM**

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/T.A.: Informal Contacts/Consultation	Upon request of potential project sponsor.	Program Staff	unknown
Comprehensive Planning/Withdrawals	Not Authorized	Not Applicable	Not Applicable
<b>Permits/Certifications/Bonds:</b> Pre-application consultation	Project sponsor approaches program staff to discuss process.	Program Staff	12
Completeness Review of preliminary draft application	Preliminary review of draft applications occurs upon submittal.	Program Staff	4
Formal Draft completeness review	Formal review of draft application occurs upon submittal by project sponsor. Program staff have 90 days to review.	Program Staff	4
Formal recommendations & proposed mitigation	Upon completion of final environmental review program staff makes recommendations.	Program Staff	4
Bonding	Performance bonds by the certificate holder to ensure post construction clean up and restoration, and long term revegetation and weed control. Performance bond required prior to certification. Predicted environmental impacts = level of bonding.	Program Staff	4
Certificate Revocations	A certificate may be revoked or suspended by the board: (1) for any material false statement in the application or in accompanying statements or studies required of the applicant if a true statement would have warranted the board's refusal to grant a certificate; (2) for failure to maintain safety standards or to comply with the terms or conditions of the certificate; or (3) for violation of any provision of this chapter, the rules issued thereunder, or orders of the board or department.	BER	none



**STATE COMPLIANCE/ENFORCEMENT TOOLS -- ENERGY PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Monitoring/Inspections:</b> Construction Monitoring Program  Full-Site Inspections	Board of Environmental Review approves a construction monitoring program. Trigger upon commencement of project construction.	Board	4
	Program staff conducts inspections of those identified environmentally sensitive areas that the project impacts.	Program Staff	2
<b>Administrative Notices/Orders:</b>	N.A.	N.A.	N.A.
<b>Admin. Penalties/Sanctions:</b>	N.A.	N.A.	N.A.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- ENERGY PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>Civil Judicial Action:</b></p> <p>Agency Initiated</p>	<p>If a project sponsor commences construction without obtaining a certificate or constructs, operates, or maintains a facility in violation of certification, or violates any rule or statutory provision of the Major Facility Siting Act or knowingly submits false information in any report, 10 year plan, or application. The project sponsor could be liable for a civil penalty of not more than \$10,000 for each violation. Each day of a continuing violation constitutes a separate offense.</p>	Attorney General	none
<p>State Resident Action</p>	<p>A resident of this state with knowledge that a requirement or a rule is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule may bring the failure to enforce to the attention of the public officer or employee by a written statement under oath that shall state the specific facts of the failure to enforce the requirement or rule. Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed under the law of perjury. If the public officer or employee neglects or refuses for an unreasonable time after receipt of the statement to enforce the requirement or rule, the resident may bring an action of mandamus in the district court of the first judicial district of this state, in and for the County of Lewis and Clark. If the court finds that a requirement or a rule is not being enforced, the court may order the public officer or employee whose duty it is to enforce the requirement or rule to perform his duties. If he fails to do so, the public officer or employee shall be held in contempt of court and is subject to the penalties provided by law.</p>	District Court	none
<p>Action to recover for damage to water supply</p>	<p>An owner of an interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from a surface or underground source may sue a person to recover damages for contamination, diminution, or interruption of the water supply proximately resulting from the operation of a facility. The remedies enumerated in this section do not exclude the use of any other remedy which may be available under the laws of the state.</p>	District Court	none

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- ENERGY PROGRAM**

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Criminal Judicial Action:	Not Authorized	Not Applicable	Not Applicable

**7. Incentives for Compliance.** The Siting Act's administrative rules provide very specific directives for content of applications and documentation of environmental and economic information. These requirements are reviewed and modified on a project-specific basis through preapplication consultation between the DEQ and the applicant. This process ensures that applications are as complete as possible on initial submittal. Deficiencies identified by the DEQ are corrected by the applicant.

The Siting Act statute and rules include specific decision criteria that govern the considerations and findings of the Board of Environmental Review. The decision criteria provide, in advance, a published yardstick by which the effects of the project will be weighed and mitigated.

When the Board of Environmental Review provides a Certificate of Environmental Compatibility and Public Need to an applicant, the certification requires specific mitigation measures which must be complied with during facility construction. Applicants are required to fund a construction monitoring program with two objectives. First, the program ensures that specific mitigation requirements identified through the EIS process are subsequently complied with by the project's owners or contractors through construction and operation of a facility. Second, the monitoring program is designed to provide feedback to the DEQ and the board on the effectiveness and appropriateness of the board's required mitigation.

Much of the MEPA work done by the Energy Program involves the voluntary compliance by energy project sponsors who prefer a coordinated permitting process to a piecemeal approach where individual programs prepare separate MEPA compliance documents. Guidance and direction for the analysis is contained in the MEPA statute and implementing rules. One goal of Energy's MEPA compliance program is to determine measures available and necessary for regulatory compliance.

**8. History of Compliance.** Twice in the last few years, the Energy Program has learned through the media or other sources that facilities were planned that, apparently unbeknownst to the project sponsor, required Siting Act review. In both instances, the program was able to bring the sponsors to the table to initiate timely review.

**9. Violations.** The Facility Siting program has never encountered a situation where the contractor and the certificate holder have not corrected a problem in a timely fashion. If noncompliance could not be corrected through a cooperative approach, a written order would be prepared in consultation with department management. The order would identify the specific noncompliance and direct corrective action. If the department order was not effective in correcting the noncompliance, the penalties in 75-20-408, MCA could be invoked.

No formal enforcement actions have ever been necessary. The program's past response to minor noncompliance activities has been tempered by the cooperative and productive working relationship that has existed between the program and the certificate holder. Were the program to be faced with a recalcitrant project sponsor, agency actions would have to reflect that lack of cooperation, and a more formal and vigorous response would be necessary.

The CY 95 list of Energy noncompliances is shown below.

<u>1995 Energy NONs, by Type and Status</u>					
<u>Month NON Issued</u>	<u>Type of Operator</u>	<u>Desc. of Violation</u>	<u>Penalty Assessed</u>	<u>Status at Year End</u>	<u>Significant Violation?</u>
None	NA	NA	NA	NA	NA

**Discovery of Violations.** The two violations noted by the Energy Program were discovered through inspections

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of</u> <u>Monitoring Reports</u>	<u>Self-Reporting</u> <u>of Violation</u>	<u>Inspection</u>	<u>Citizen</u> <u>Complaint</u>
Project Sponsors	2	NA	NA	2	NA

**10. Considerations in Calculating Penalties.** The Energy Program does not have a formal process for calculating penalties. The program has not assessed a penalty. A civil penalty of not more than \$10,000 for each violation of the MFSA can be assessed by a Court.

**11. Resolution of Noncompliances.** The two violations discovered through inspections have been resolved informally.

**12. Current Compliance Priorities.** Agency staff have identified the following short-term priorities for the Energy program:

- 1. Timely federal participation in joint review of projects.
- 2. Facilitation of the regulatory reform group analyzing the Major Facility Siting Act.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** Not applicable.

**Partnerships.** The program has a standing memorandum of understanding with the U.S. Forest Service and the Bureau of Land Management to review facilities on federal lands in Montana. For Siting Act projects the Energy program is designated the lead state agency for the environmental review process.

**Delegated Authority.** Not applicable.

## ENVIRONMENTAL REMEDIATION DIVISION

This division is one of 6 divisions currently organized within the Department of Environmental Quality. It was formally organized in 1994 by removing from the former Department of Health and Environmental Sciences (DHES), Solid and Hazardous Waste Management Bureau those programs or portions of programs which have environmental cleanup responsibilities and consolidating them into the new division. The Environmental Remediation Division administers programs established to clean up sites contaminated by a variety of substances and activities, including: 1) Superfund or CERCLA (the federal Comprehensive Environmental Response, Compensation and Liability Act) which allows the state to investigate potentially hazardous disposal sites to determine if past disposal practices are resulting in threats to public health or the environment; 2) the Comprehensive Environmental Cleanup and Responsibility Act or CECRA (also referred to as the State Superfund or Mini-Superfund Act) which enables the state to investigate and cleanup or require cleanup of hazardous waste or other damaged sites in Montana that are not on the Federal National Priority List; and 3) the corrective action portion of the Montana Hazardous Waste and Underground Storage Tank Act, also referred to as the Underground Storage Tank Corrective Action program (USTCA), which provides for the remediation of leaking underground storage tank sites.

All three of the division's programs have been identified as being subject to review under the criteria established by the EQC. Budget, staffing, and funding source information for the division for FY 96 is provided below.

<u>Funding Source, FY 96</u>						
	General	State			Total	
<u>Program/Activity</u>	<u>Fund</u>	<u>Special</u>	<u>Fees</u>	<u>Federal</u>	<u>Funds</u>	<u>FTE auth.</u>
Superfund(CERCLA)	0	25,059	0	2,474,430	2,499,489	13.05
Spec Proj.BNRR\ARCO	0	645,852 <sup>1</sup>	0	0	645,852	5.45
State SFund(CECRA)	0	908,221	0	100,000	1,008,221	9.80
UST LUST Trust	0	134,583	0	851,247	985,830	5.86
UST DEQ PetroBd	<u>0</u>	<u>795,718</u>	<u>0</u>	<u>0</u>	<u>795,718</u>	<u>14.34</u>
<b>TOTAL (FY 96)</b>	0	2,509,433	0	3,425,677	5,935,110	48.50

<u>Funding Source, 1990</u>						
Superfund (CERCLA)	0	11,933	0	6,226,727	6,238,660	14.00
Spec Proj.BNRR\ARCO	0	0	0	0	0	0.00
State SFund (CECRA)	0	222,631	0	0	222,631	1.50
UST LUST Trust	0	67,634	0	613,583	681,217	5.50
UST DEQ Petrobd	<u>0</u>	<u>340,965</u>	<u>0</u>	<u>0</u>	<u>340,965</u>	<u>7.50</u>
<b>TOTAL (FY 90)<sup>2</sup></b>	0	643,163	0	6,840,310	7,483,473	28.50

Notes:

<sup>1</sup> Under compliance agreement, DEQ costs for oversight etc, are reimbursed by BNRR and ARCO.

<sup>2</sup> The Environmental Remediation Division did not exist in FY 90; information was extracted from DHES Solid and Hazardous Waste Bureau figures and include only Superfund, LUST\USTCA, and CECRA as identifiable.

sources: LFA, 1995, 1989., Geach 1996

## Legislative History

Events important to the compliance/enforcement elements of the Environmental Remediation Division are summarized below.

- 1980 Congress enacts CERCLA
- 1983 Legislature authorizes Montana to implement portions of Federal CERCLA.
- 1984 Congress enacts Resource Conservation and Recovery Act (RCRA) Subtitle I, Federal UST program
- 1985 Montana enacts UST program through amendments to Montana Hazardous Waste Management Act.
- 1985 Montana CECRA enacted
- 1988 Federal EPA Underground Storage Tank regulations adopted
- 1989 Montana Petro-Fund enacted, funding remediation efforts for underground storage tanks
- 1989 Montana Underground Storage Tank regulations adopted
- 1989 CECRA first funded; with Resource Indemnity Trust funds
- 1994 Environmental Remediation Division formed from cleanup programs formerly in the Solid and Hazardous Waste Bureau.
- 1995 Department of Environmental Quality established; these Department of Health and Environmental Sciences programs incorporated into new DEQ.

# Superfund Program

The purpose of the superfund program is to: 1) protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances; 2) encourage private parties to clean up sites within the state at which releases of hazardous or deleterious substances have occurred, resulting in adverse impacts on the health and welfare of the citizens of the state and on the state's natural, environmental, and biological systems; and 3) provide for funding to study, plan, and undertake the rehabilitation, removal, and cleanup of sites within the state at which no voluntary action has been taken.

## **1. Constitutional and Statutory Goals.** The following provides the statutory and constitutional goals of the Superfund Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II, Sec. 3, Inalienable Rights** - conveys the right of every Montanan to a clean and healthful environment for present and future generations.
- **Comprehensive Environmental Cleanup and Responsibility Act (CECRA) 75-10-706, MCA,**
  - (1) protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances;
  - (2) encourage private parties to clean up sites within the state at which releases of hazardous or deleterious substances have occurred, resulting in adverse impacts on the health and welfare of the citizens of the state and on the state's natural, environmental, and biological systems; and
  - (3) provide for funding to study, plan, and undertake the rehabilitation, removal, and cleanup of sites within the state at which no voluntary action has been taken.

Supplemental state authorities: None.

Related federal authorities:

- **Comprehensive Environmental Response Compensation and Liability Act (CERCLA)** does not specifically designate its purposes and goals, but the main purpose of the CERCLA Program is to facilitate the protection of human health and the environment by cleaning up environmental contamination caused by releases of hazardous substances.

CECRA administrative rules: None

Specific enforcement authority:  
MCA 75-10-711, 714, & 715.

Primacy/jurisdictional agreements:

- None

**2. Program Goals and Objectives.** The Superfund Program implements activities under CERCLA and CECRA to clean up uncontrolled releases of hazardous and deleterious substances at sites in Montana in order to assure protection of public health and the environment and compliance with environmental laws and regulations. Following are the objectives the Superfund Program provided in 1995 legislative information on the program for the FY 96-97 biennium.

Note: Under CECRA, parties that can be held responsible for cleanup are designated as potentially liable persons; Under CERCLA, parties that can be held responsible for cleanup are designated as potentially responsible parties. For consistency purposes, these parties are hereafter referred to as responsible parties in this document.



A. Federal Superfund (CERCLA) Program

1. Investigate and prioritize sites where hazardous or deleterious substances have been released to the environment by conducting preliminary assessments and, where necessary, site investigations of sites identified in the Environmental Protection Agency (EPA) CERCLA information system.
2. Conduct remedial investigations and cleanup actions at the federal Superfund sites delegated to Montana for state-lead status under cooperative agreements with EPA.
3. Provide technical, legal, and management assistance to EPA for remedial investigations and cleanup actions at federal Superfund sites maintained in federal-lead status.

4. Assist EPA in recovering cleanup costs at sites with viable responsible parties by maintaining detailed records of work conducted and costs incurred at those sites.
5. Maintain the Clark Fork Basin comprehensive data management system and Geographical Information System and continue involvement in basin-wide issues by participating in the Clark Fork Coordinating Forum.
6. Provide communication and coordination with local governments and citizens by maintaining a Superfund toll-free hotline, responding to inquiries and requests for information, and coordinating input and expertise from other programs, bureaus and agencies.

B. State Superfund (CECRA) Program

1. Address high priority sites by overseeing the investigations and cleanups of sites being conducted by responsible parties either voluntarily or under order, by initiating orders for investigation and cleanup activities where necessary, and by initiating expedited interim cleanup actions where appropriate to eliminate imminent public health and environmental hazards.
2. Prioritize actions on sites by conducting initial sampling and research to determine the potential impact to public health and the environment, identifying responsible parties, and ranking the sites using the CECRA ranking system.
3. Recover costs at sites with viable responsible parties by identifying and notifying responsible parties, maintaining cost documentation records, and billing responsible parties.

4. Provide communication and coordination with agencies, local governments, and citizens by responding to inquiries and information requests, providing expertise to other programs, and developing and maintaining a site tracking database.
5. Conduct oversight of voluntary remedial actions initiated by responsible parties at medium to low priority sites.
6. Improve and expedite the state Superfund investigation and cleanup process by developing rules, cleanup standards, and guidance for program personnel and responsible parties.
7. Address grant and orphan sites, where there are no responsible parties, by conducting investigation and cleanup activities where necessary to eliminate imminent public health and environmental hazards as program resources allow.

C. Superfund Special Projects

1. Provide technical and legal review and input, including field oversight as necessary, at ARCO-initiated expedited actions at federal Superfund sites within the Clark Fork Basin.
2. Provide technical and legal review and input for nonsite-specific Superfund-related activities initiated by ARCO within the Clark Fork Basin, including treatability studies and cultural resources management plans, which are intended to speed up and streamline the Superfund cleanup actions in the basin.
3. Provide technical, legal, and management oversight of all remedial investigation and cleanup activities at Burlington-Northern sites under a Superfund cleanup consent decree.
4. Recover special-project costs from ARCO and Burlington-Northern by maintaining cost documentation records and billing the responsible parties regularly.
5. Provide communication and coordination with agencies, local governments and citizens by responding to inquiries and requests for information, and coordinating input and expertise from other programs, bureaus and agencies.

**3. Program Activities.** The Superfund Program manages three types of projects: 1) federal Superfund projects; 2) state Superfund projects; and 3) special projects funded by responsible parties at both state and federal Superfund sites.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg. Years Staff Retntn.<sup>1</sup></u>	<u>FY 96 Ongoing Sites/OU<sup>2</sup></u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
<b>Federal Superfund</b>	<b>2,536,165</b>	<b>13.05</b>	<b>NA<sup>3</sup></b>	<b>8/23</b>	<b>NA</b>	<b>NA</b>
<b>State Superfund</b>	<b>1,008,221</b>	<b>9.8</b>	<b>NA</b>	<b>60</b>	<b>NA</b>	<b>NA</b>
<b>Special Projects</b>	<b>719,845</b>	<b>5.45</b>	<b>NA</b>	<b>3</b>	<b>NA</b>	<b>NA</b>
<b>Total</b>	<b>4,264,231</b>	<b>28.3</b>	<b>2.64</b>	<b>71/23</b>	<b>NA</b>	<b>NA</b>

<sup>1</sup> The 2.64 represents the average turnaround for the entire Superfund Section between 1985 and 1996. Staff retention data is also available based on the following categories: between 1985 and 1996, 10 managers worked an average of 3.08 years; 8 attorneys worked an average of 2.59 years; 33 technical staff worked an average of 3.22 years; 21 clerical staff worked an average 1.45 years.

<sup>2</sup> OU stands for operable unit. Because most of the federal Superfund sites cover large areas, they are divided into "operable units," which are distinct parts of the site that can be readily investigated and cleaned up separately.

<sup>3</sup> NA - Not available. Some of these statistics could be made available but more time would be needed to obtain them than the revision turnaround time provided by EQC.

**Fees and Charges.** The Superfund Section does not receive any funds from permit or other licensing or registration fees. However, part of the CECRA Program funding comes from recovery of state expenditures at CECRA sites where there are viable responsible parties. Typically, 50 to 60 percent of CECRA program costs are recovered. Between FY 94 and FY 95, CECRA cost recovery averaged \$372,465.47. The EPA handles cost recovery from responsible parties on federal Superfund sites.

**4. Regulated Communities.** Under CECRA and CERCLA, the following entities can be responsible parties at sites where hazardous substances have been released:

- current owners or operators (unless certain defenses apply);
- those who owned or operated the property at the time of disposal of the hazardous substance;
- those who arranged for the disposal of the hazardous substance on the property; or
- those who transported the hazardous substances to the property for disposal there.

Therefore the categories of responsible parties under CECRA and CERCLA are based on the

relationship of the party to the property which poses the threat. As of January 1996, the DEQ has issued notice letters to 131 either corporate or individual entities at 63 state Superfund sites. Most of these entities were noticed because they were either the current owner **and** operator and/or past owner **and** operator. The EPA handled notice letters for the federal Superfund sites.

Of the 8 federal Superfund sites, 5 are mining and 3 are wood-treating sites. Of the 277 state Superfund sites addressed or to be addressed by the CECRA Program, the following is a breakdown of the types of sites that gives an idea of the regulated community: 38 miscellaneous chemical/hazardous waste (plating, battery, spills, etc.), 36 mining/smeltering, 31 woodtreating, 29 railroad, 28 landfills/dump, 26 old refineries, 21 pesticide sites, 17 miscellaneous petroleum sites, 13 drum/barrel sites, and 38 other (outdoor asbestos, solvent, radioactive wastes).

**5. Philosophical Approach to Enforcement and Compliance.** In Superfund, almost all of the program's actions involve forcing responsible parties to investigate and clean up sites. While the Superfund Program has enforcement authorities (in fact the whole of Superfund is built upon the ability of the EPA and DEQ to force cleanup of contaminated sites), these authorities are applied entirely differently from classical environmental enforcement. Classical enforcement is typically a last resort after other methods of permitting/compliance have failed to attain the results desired. Violations of permit requirements or laws are noted and enforcement actions taken to remedy those violations.

Superfund action, on the other hand, is not based on violation of laws or permits and consequent action. It is instead the identified risk or threat of risk to public health or the environment that can trigger the agency enforcement action. Decisions to take action are based primarily on the relative size of the risk, but also take into account the willingness of responsible parties to take action and the resources of the department available to take action. Because all of the program's actions are based on the program's authority to take direct enforcement action and because the program has the ability to recover all of its response costs, everything done, from the initial investigation at a site through final cleanup, could be considered an enforcement action.

Before significant state monies can be spent in remedial actions other than emergency actions, the DEQ must determine what entities are responsible parties, issue notice letters to them, and offer them the opportunity to conduct a timely remedial action. Typically, notice letters are the only enforcement tool needed to accomplish necessary remedial action at small sites. However, the DEQ issues either administrative orders on consent or unilateral orders at large sites that present the greatest threat to public health.

At some sites with multiple noticed entities, the DEQ may choose to only issue an order to one or a few of these multiple entities and not all of them. This is often done when one entity is more financially capable of conducting the action than other entities or when one entity contributed to the majority of contamination. More statistics on this issue are provided in the March 6, 1996 Superfund Section submittal to the EQC Enforcement and Compliance Subcommittee.

Frequency of violations are not taken into account at Superfund sites, principally because the contamination occurred historically and may not have involved any violations at the time the facility operated. However, the DEQ does take into account contribution to and causes of contamination in determining what entities are responsible parties. The DEQ attempts whenever possible to have the entities that contributed to the majority of the contamination be the entities responsible for cleanup. At

72% of 61 CECRA sites for which notice letters have been issued by the department, the responsible party addressing the site contributed the greatest portion of total contamination. If the entity that operated the facility and caused all the contamination problems is viable, then that is the only entity the DEQ is likely to take an enforcement action against even though other entities could be held responsible. DEQ has not issued notice letters to entities that only maintain a residential use of the property, such as people who have houses overlying contaminated ground water.

**6. Compliance Tools Available and Used.** The menu of tools used by the Superfund Program is shown on the following pages.

STATE COMPLIANCE/ENFORCEMENT TOOLS -- SUPERFUND PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete <sup>1</sup>	Times Used? (95) <sup>2</sup>
<b>Education/Information/Technical Assistance:</b> Pamphlets/Brochures explaining program Site specific fact sheets On site technical assistance Technical workshops	Provided upon request.	Program Staff	unknown
	Issued during critical stages in the investigation/cleanup process.	Program Staff	8
	Provided as needed.	Program Staff	unknown
	Provided as needed.	Program Staff	2
<b>Comprehensive Planning/Withdrawal:</b>	Not authorized	Not applicable	Not applicable
<b>Permits/Certification/Bonds/Voluntary Plans:</b>  Permits  Voluntary Cleanup Plans	Not Authorized	Not applicable	Not applicable
	Anyone, whether a responsible party or not, can initiate voluntary cleanup plan by submitting a Voluntary Cleanup and Redevelopment Act proposal to DEQ. (This Act was not effective until May 1, 1995.)	Anyone	Two applications
<b>Monitoring/Inspections:</b>	When there has been a release or there is a substantial threat of a release into the environment that may present an imminent and substantial endangerment to the public health, welfare, or safety or the environment and whenever the department has reason to believe that a release has occurred or is about to occur, the department may undertake remedial action in the form of any investigation, monitoring, survey, testing, or other information-gathering that is necessary and appropriate to identify the existence, nature, origin, and extent of the release or the threat of release and the extent and imminence of the danger to the public health, safety, or welfare or the environment.	Program Staff	unknown

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SUPERFUND PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete <sup>1</sup>	Times Used? (95) <sup>2</sup>
<b>Administrative Notices/Orders/Settlements:</b>			
General Notice Letters	After research is deemed adequate to identify responsible parties and action is deemed necessary on the site. Notice letters also trigger cost recovery. Notice letters are generally served on a priority basis (i.e., high priority sites noticed before low priority sites).	Director	51 ltrs/ 25 sites
Special Notice Letters	Used to initiate negotiations on Administrative Orders on Consent	Director	3 ltrs/ 15 sites
Administrative Orders on Consent/Consent Decrees	If cooperative responsible parties are involved on the site, an Administrative Order on Consent may be offered to initiate cleanup actions on the site.	Director	1
Unilateral Administrative Orders	When negotiations on an Administrative Order on Consent fail or when responsible parties are uncooperative or recalcitrant.	Director	1
Negotiation of De minimis Settlements	A negotiated settlement can be used when the department determines it to be practicable and in the public interest. If the department can promptly reach a final settlement with a person liable in an administrative or civil action and if the settlement involves only a minor portion of the response costs at the facility concerned, then in the judgment of the department if certain statutory conditions are met, the department and the responsible party may pursue a negotiated settlement.	Director	0
<b>Administrative Penalties/Sanctions: Penalties</b>	The department may assess penalties of not more than \$1,000 per day per violation against a person liable for a release or threat of release who has failed or refused to comply with an order issued by the department or against a person who has failed or refused to comply with an order issued by the department. In determining the amount of any penalty assessed pursuant to this section, the department shall take into account the nature, circumstances, extent, and gravity of the noncompliance and, with respect to the person liable, his/her ability to pay; any prior history of such violations; the degree of culpability; the economic benefit or savings, if any, resulting from the noncompliance; and any other matters as justice may require.	Director	unknown

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SUPERFUND PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete <sup>1</sup>	Times Used? (95) <sup>2</sup>
<b>Judicial Civil Action:</b> Civil Penalties	A person who violates or fails or refuses to comply with an order issued may, in an action brought to enforce the order, be assessed a civil penalty of not more than \$10,000 for each day in which a violation occurs or a failure or refusal to comply continues. In determining the amount of any penalty assessed, the court may take into account: (I) the nature, circumstances, extent, and gravity of the noncompliance; (ii) with respect to the person liable: (A) the person's ability to pay; (B) any prior history of violations; (C) the degree of culpability; and (D) the economic benefit or savings, if any, resulting from the noncompliance; and (iii) any other matters as justice may require.	Director approval, District Court Decision	1
<b>Cost Recovery Actions</b>	When one or more responsible parties does not reimburse DEQ for outstanding costs, DEQ may file for cost recovery. Can be used anytime a responsible party does not pay within 60 days of receiving a bill.	Attorney	
<b>Criminal Judicial Action</b>	Not Authorized	Not Applicable	Not Applicable

<sup>1</sup> For each particular site, the assigned technical project officer and attorney evaluate what entities are responsible parties by collecting information on the site ownership and operation. They consult with the Superfund Program Manager and Environmental Remediation Division Administrator in deciding which of the possible responsible parties should be issued notice letters, orders, or penalties. Their recommendation is provided to the Director, who makes the final decision on notice letters, orders, or penalties.

<sup>2</sup> Tracked for calendar year 1995.

**7. Incentives for Compliance.** The following list includes several of the methods used to promote compliance. Section staff have divided this category into two subcategories: 1) Disincentives for Noncompliance, and 2) Incentives for Compliance. Section staff believe the disincentives for noncompliance have a stronger effect than the incentives for compliance.

A. Disincentives for Noncompliance

1. Noncompliance with terms of notice letters or orders can result in the entity being required to reimburse the state for its costs in conducting the required action plus two times the amount of the state's costs.
2. Statutory penalties available to the state include administrative penalties of \$1,000/day and civil penalties of \$10,000 day/violation. Willful violation of a CERCLA order at a federal Superfund site carries a penalty up to \$25,000 per day for each violation. In addition, orders typically have stipulated penalties for noncompliance with particular terms of the order, such as deadlines for documents required by the order.
3. Because the liability scheme under CECRA is explicitly strict, several, and joint, responsible parties initially focus resources on cleaning up sites than litigating over culpability/responsibility.

B. Incentives for Compliance

1. Superfund technical and legal staff provide meeting opportunities and written comments to assist responsible parties in understanding requirements. Orders require the DEQ or EPA approval of key elements of planned cleanup action by responsible parties.
2. A "no further action" letter is available to entities successfully conducting DEQ-approved voluntary remedial actions in compliance with the new Voluntary Cleanup and Redevelopment Act.
3. Both Superfund Programs have general guidance on remedial investigations/feasibility studies and risk assessments that assists responsible parties in conducting these activities.
4. Parties that cleanup facilities in compliance with terms of Superfund laws and orders have a legal right of contribution against other responsible parties for an equitable share of the costs.
5. Compliance with Superfund laws and orders allows a responsible party contribution protection from other responsible parties that did not settle with the state.
6. Educational Efforts:
  - a. Superfund staff give formal presentations at meetings, conferences, annual meetings, and workshops to explain the requirements of Superfund.
  - b. Public meetings and comment periods are advertized and held frequently throughout the Superfund investigation and cleanup process.



- c. Testimony is provided at legislative committee hearings.
- d. News releases and articles for the news media are prepared, released and distributed for public information purposes.
- e. Fact sheets are provided for large sites undergoing multi-year remedial actions at critical phases in the Superfund Process such as completion of a remedial investigation, feasibility study, risk assessment, or proposed plan.
- f. A database is maintained to provide general information on all facilities.
- g. Every two years, a Superfund Basics booklet is produced to explain the Superfund process and to summarize progress on specific sites.

**8. History of Compliance.** Section staff have indicated that it would take a greater level of effort than available in the revision time provided to them to provide the requested graphs similar to the Hard Rock permitting and noncompliance statistics over ten years. In addition, the type of violations in Superfund do not lend themselves easily to the desired graphical presentations. Instead, the following qualitative information summarizes all Superfund violations since its inception.

#### I. Violations at Federal Superfund Sites

- A. DEQ lead orders - no violations
  - 2 investigation orders
  - 1 information order
  - 1 removal order
  - 5 access orders
  - 1 consent decree
- B. EPA lead/DEQ signatory orders - no violations
  - 7 investigation orders
  - 1 removal order
  - 1 consent decree

#### II. Violations at State Superfund Sites

- A. DEQ orders - 3 violations
  - 1 investigation consent decree
  - 4 fencing orders
  - 6 investigation orders
  - 5 information orders
  - 1 access order
  - 6 removal orders
- B. Notice Letters
  - 1. 63 cost recovery actions initiated - 7 violations
  - 2. 20 remedial actions required - 5 violations

## **9. "Violations"**

- A. Violations of orders/consent decrees - No violations occurred in 1995.
- B. Violations of notice letter provisions
  - 1) Cost Recovery Violations: Once the department issues notice letters, it bills the identified responsible parties for state oversight costs on a quarterly basis. For the notice letters issued in 1995, costs were not paid at five sites. State costs at these five sites for calendar year 1995 totaled \$35,741.56. For on-going cost recovery violations from notice letters issued before 1995, outstanding costs in 1995 totaled \$127,456.28 for two sites.
  - 2) Remedial Action Violations. For the notice letters issued in 1995, remedial actions were not conducted by responsible parties as required at four sites. Following is a description of the violations at these four sites:
    - Site 1: The responsible parties are disputing ownership and did not conduct the required tank removal action in the time frame allotted.
    - Site 2: The responsible party did not submit the required cleanup plan because he was bankrupt and had arguably noticed DEQ of his bankruptcy.
    - Site 3: The responsible party did not meet the deadline for submitting an acceptable investigation work plan.
    - Site 4: Due to claim of a bankruptcy bar, the responsible party declined to participate in a requested meeting.

## **Discovery of Violations**

### **A. New Sites**

Alleged releases of hazardous substances are identified from various sources, including but not limited to citizen complaints; referral from the EPA or other state environmental agency or other environmental programs within the DEQ; and employee complaints. Section staff did not have statistics readily available on the source of complaints. They received 12 complaints in 1990, 35 in 1991, 46 in 1992, 21 in 1993, 19 in 1994, and 13 in 1995. More information on procedures of handling new sites is contained in the Superfund Section March 6, 1996 submittal to the EQC Enforcement and Compliance Subcommittee.

### **B. Existing sites**

Violations of orders or notice letter requirements for particular remedial actions at Superfund sites are

typically identified via field inspections documented with photographs and a field inspection report. The other type of violation, that of a missed deadline for a deliverable or inadequacy of a deliverable, is determined via tracking of document submissions and analysis of how document requirements are addressed in the deliverable. For example, if an order requires DEQ comments on a draft document to be incorporated into a final document and those comments are not incorporated, DEQ would note the violation in writing and take the appropriate response provided for in the order. Sometimes that response can be that the agency makes the needed revisions in the document.

**10. Considerations in Calculating Penalties.** In determining the amount of any administrative penalty assessed pursuant to § 75-10-714, MCA, the department will take into account the nature, circumstances, extent, and gravity of the noncompliance and, with respect to the person liable under § 75-10-715(1), MCA, the ability to pay; any prior history of such violations, the degree of culpability, the economic benefit or savings, if any, resulting from the noncompliance; and any other matters as justice may require.

Section 75-10-711, MCA, provides that, in determining the amount of a civil penalty in response to a violation of an order, the court may take into account:

1. the nature, circumstances, extent, and gravity of the noncompliance; and
2. with respect to the person liable under § 75-10-715(1), MCA,
  - the person's ability to pay;
  - any prior history of violations;
  - the degree of culpability; and
  - the economic benefit or savings, if any, resulting from the noncompliance; and
  - any other matters as justice may require

No other calculation formulas for penalties exist.

## **11. Resolution of Noncompliances**

Resolution of the 1995 calendar year violations identified in No.9 "Violations" is as follows:

### **A. Notice Letter Cost Recovery Violations**

Of the five cost recovery violations initiated in calendar year 1995, one was resolved with payment by the responsible party of outstanding costs in 1996. Two of the four remaining violations are now being handled by the Attorney General's bankruptcy attorney. It is expected that costs will be paid on the fourth site that is undergoing a voluntary cleanup this year because costs must be paid by the responsible parties in order to obtain a no further action letter. The DEQ has not proceeded with a cost recovery suit at the fifth site because of questions concerning the viability of the responsible parties that need to be determined before significant resources are spent seeking costs from a entity that can not pay them. Resolution involves the filing of a cost recovery action in court, which will require a significant level of attorney effort. They are not considered a high priority project at this time given the amounts involved and given the "cushion" provided by the CECRA statute of limitations.

For the on-going cost recovery violations at two the sites described in Section 10(B)(1), DEQ has

filed a claim for delinquent costs as part of on-going litigation at one site and initiated negotiations on a Department of Defense State Memorandum of Agreement that will provide for reimbursement of state costs at the other site. The Department of Defense has placed negotiations on hold pending resolution of federal budget issues.

#### B. Other Notice Letter Violations

Resolution of the 4 violations discussed in Section 9(B)(2) is as follows:

- Site 1: DEQ conducted the required tank removal action and one responsible party involved agreed to reimburse DEQ costs.
- Site 2: Since this site involves a bankrupt party that is not viable, the DEQ is working with several prospective purchasers and the lender on a possible voluntary cleanup.
- Site 3: The DEQ is reviewing the financial capabilities of the responsible party to conduct the action.
- Site 4: This site involves a responsible party claiming a bankruptcy bar and will be handled by the Attorney General's bankruptcy specialist in cooperation with the CECRA Attorney.

More details on resolutions on all violations is provided in the Superfund Section's March 6, 1996 submittal to the EQC Enforcement and Compliance Subcommittee.

**12. Current Compliance Priorities.** Section staff have identified the following **short-term** priorities involving compliance:

- 1) Resolve the outstanding notice letter violations described in Sections 9B and 11 A and B.
- 2) Assure compliance with provisions of notice letters and orders issued in 1996 on high-priority sites.

#### **13. Compliance Relationships with Other Agencies**

**Oversight.** There is no federal oversight of the CECRA Program. However, there is federal oversight of the CERCLA Program, which is almost entirely federally-funded. This oversight involves EPA's review and approval of cooperative agreements that specify the state's activities at federal Superfund sites and the funding provided for these activities. The DEQ provides quarterly financial and progress reports on these cooperative agreements. State expenditures of federal moneys are the subject of periodic federal audits. EPA and the state work very closely together on the federal Superfund sites by, for example, providing comments to the lead entity on projects, reaching joint records of decisions, and being joint parties to administrative orders.

**Partnerships.** Neither the CERCLA or CECRA Program have any interagency agreements with other state agencies involving enforcement. However, the CERCLA Program has the ability, through

cooperative agreements and MOUs with the EPA, to conduct enforcement activities at federal Superfund sites. The state must have its own independent enforcement authority to be able to conduct these actions at federal sites, and DEQ uses CECRA as its authority. The procedures involved in this “delegation” of enforcement authority from the EPA to the DEQ are covered in both CERCLA and the National Contingency Plan, which sets out EPA’s regulations for implementing CERCLA. In addition, more specific guidance on how DEQ conducts these enforcement actions is contained in site-specific cooperative agreements. The DEQ has used this authority to conduct enforcement actions at 2 NPL sites - Montana Pole and Silver Bow Creek.

Within state government, the Superfund Section regularly consults with the Montana Department of Justice Natural Resource Damage Litigation Program and the Department of Fish, Wildlife, & Parks on an internal basis and contracts for services with the State Library Natural Resource Information System and the Montana universities.

**Delegated Authority.** Any delegated federal authority for DEQ action at federal Superfund sites is handled as described above through site-specific cooperative agreements.

# Underground Storage Tank Corrective Action Program

The Underground Storage Tank Corrective Action Program comprises the Leaking Underground Storage Tank (LUST) Trust Fund Program and the Petroleum Tank Release Compensation Fund (PTRCF) technical staff. This program is responsible for implementing the corrective action or release response requirements of the Montana Hazardous Waste and Underground Storage Tank law and ARM Title 16, Chapter 45, Sub-Chapter 6. It oversees, requires and sometimes performs, by contract, the cleanup of sites contaminated by releases of regulated substances from underground storage tanks. Regulated substances are liquid petroleum products and hazardous substances. Hazardous substances are those so defined by the federal Superfund Act (the federal Comprehensive Environmental Response, Compensation, and Liability Act or CERCLA).

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Underground Storage Tank Corrective Action Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II Section 3 and Art. IX Section 1;** Maintain and improve a clean and healthful environment for present and future generations.
- **Montana Hazardous Waste and Underground Storage Tank Act;** (MCA Sec 75-10-401 et.seq.)
- **Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA);** (MCA Sec 75-10-701 et.seq.)

Supplemental and/or related state authorities:

- **The Montana Solid Waste Management Act** (MCA 75-10-201, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)
- **Petroleum Storage Tank Cleanup** (MCA 75-11-301, et.seq.)

Related Federal authorities:

- **Resource Conservation and Recovery Act (RCRA)** Subtitle I
- **CERCLA**

Underground Storage Tank rules:

- ARM 16.45.101-1240

Specific enforcement authority:

- **Montana Hazardous Waste and Underground Storage Tank Act:**
  - a. Administrative Rules: §75-10-405(2)(c);
  - b. Administrative Enforcement: §75-10-413;
  - c. Injunctive Relief: §75-10-414;
  - d. Civil Penalties: §75-10-417;
  - e. Administrative Penalties: §75-10-423.
- **Montana Comprehensive Environmental Cleanup and Responsibility Act:**
  - a. Administrative Rules: §75-10-702;
  - b. Administrative Remedial Action Orders and Civil Penalties §75-10-711(4),(5);
  - c. Legal and Equitable Relief: §75-10-711(8);
  - d. Administrative Penalties: §75-10-714;
  - e. Cost Recovery and Penalties: §75-10-715.
- **Primacy and jurisdictional agreements:**
  - a. State program approval and primacy from the federal EPA
  - b. State program\Assiniboine Sioux cooperative agreement
  - c. State\EPA Cooperative Enforcement Agreement

**2. Program Goals.** Based upon the above-referenced guidance, the Underground Storage Tank Corrective Action Program has identified the following program goals:

1. To protect the public health and welfare of all Montana citizens against the dangers arising from releases of hazardous or deleterious substances;
2. To encourage private parties to clean up sites within the state at which releases of hazardous or deleterious substances have occurred from

- underground storage tanks, resulting in adverse impacts on the health and welfare of the citizens of the state and on the state's natural, environmental, and biological systems; and
3. To provide for funding to study, plan, and undertake the rehabilitation, removal, and cleanup of sites within the state at which no voluntary action has been taken.
  4. To remedy violations of underground storage tank requirements pursuant to the Montana Comprehensive Environmental Cleanup and Responsibility Act [75-10-701, et.seq., MCA]. To remedy violations of underground storage tank requirements established under the Montana Hazardous Waste and Underground Storage Tank Act [§§75-10-401, et.seq., MCA]

**3. Program Activities.** In general, the Underground Storage Tank Corrective Action Program (USTCA) implements the environmental cleanup requirements of the Montana Hazardous Waste and Underground Storage Tank Act (MCA 75-10-401 et.seq.) The Underground Storage Tank (UST) Program is currently split into two units; one which implements the tank management, licensing, and permitting requirements designed to prevent releases (the UST Release Prevention Program), and this Corrective Action Program which manages and requires remediation of the releases which do occur. The UST Corrective Action Program staff responds to tank owner notices of releases or spills and to complaints regarding fuel or chemical vapors or ground water contamination which may be related to an underground storage tank. The USTCA Program itself consists of two subunits. One staff unit deals with releases for which the source and responsible party is known in an attempt to correct the problem in accordance with state law (the Department of Environmental Quality, Petro-Fund Program). The other staff unit deals with releases or complaints for which there is no obvious identifiable source or responsible party, or the responsible party is known but is either financially unable to respond or is recalcitrant. This latter program is 90% financed with federal EPA Leaking Underground Storage Tank (LUST) Trust funds.

<u>Program Activities</u>	<u>FY96 Budget</u>	<u>FY96 FTEs*</u>	<u>Avg. Years Staff Retntn**</u>	<u>1996 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
DEQ-PetroFnd resps	\$795,718	14.34	2.06 yrs	1305	NA	350
LUST Trst respses	\$1,010,073	5.86	2.06 yrs	25	NA	10

**TOTAL**      \$1,805,791 20.2 auth.

\* includes 0.5 FTE attorney, 5.2 FTE in supervisory, administrative, and program support activities. Current actual staffing level = 19.2 FTE.

\*\* Refers to an average of the following:

Between 1985 and 1996, the average length of employment in the program for the four basic employee groups was:

Administrative Support	2.41 years
Solid & Haz Wste Specialists	2.18 years
Administration	2.23 years
Attorneys	1.42 years

source: Kuhn, 1996.

**Fees and Charges.** The program receives **no** revenues from fees or charges. It receives an EPA grant to fund the Federal LUST Trust efforts (90% EPA and 10% state RIT match) and the balance of the program's effort, (the DEQ-PetroFund program) is funded by the Petroleum Tank Release Compensation Board (PTRCB or Petro-Board). The program receives no General Fund monies.

<u>Type</u>	<u>Amount</u>	<u>Prog cummul. Total</u>	<u>FY 96 Total</u>	<u>Allowed Uses</u>
Cost Recovery- LUST Trst	varied	\$170,500	0	*UST prog
Noncompliance Penalties:	varied	17,500	0	general fund
Admin. fines (under CECRA)	varied	0	0	**EQPF
Admin. fines (under HW\UST)	varied	rules not final	-	general fund
<b>TOTAL:</b>		<b>188,000</b>		

\*UST Corrective Action Program

\*\*Environmental Quality Protection Fund

source: Kuhn, 1996.

**4. Regulated Communities.** The regulated community for the Underground Storage Tank (UST) Program includes any "person," as defined in MCA §75-1-403(12), who owns or operates an underground storage tank system. The regulated community for the UST Corrective Action Program includes any UST owner or operator who has been identified as having a suspected or confirmed release of a petroleum product or hazardous substance. The universe of UST owners and operators consists of federal, state and local governments, schools, hospitals, railroads, service stations, utilities, convenience stores, farms and other industrial and commercial enterprises (see UST Release Prevention Program summary in the Waste Management Division for graphic).

In trying to obtain compliance with the corrective action requirements of the UST Program, the regulated community sorts itself into various categories. The USTCA Program utilizes a variety of informal and formal compliance and enforcement tools for these communities.

**Known owners/operators eligible** (in compliance with UST program requirements) for partial reimbursement of remediation costs from the Petro-Fund.

**Known owners/operators eligible** for Petro-Fund reimbursements **but**

- a) financially unable to afford the 50\50 cost share on the first \$35,000 in remediation costs or
- b) recalcitrant....LUST Trust designation.

**Known owners/operators NOT eligible** for Petro-Fund reimbursements because they are

- a) not in compliance with UST program requirements and who are:
  - 1) financially solvent, or
  - 2) not financially solvent or recalcitrant....LUST Trust designation.
- b) statutorily excluded from fund access (chemical tanks, railroads, etc,)
  - 1) financially solvent, or
  - 2) not financially solvent or recalcitrant....LUST Trust designation.

**Unknown source(s) of release....**LUST Trust designation; remedial investigation by agency to identify liable party(ies).



**5. Philosophical Approach to Compliance.** The UST Corrective Action Program is somewhat unique from the universe of environmental pollution prevention programs. By the time this segment of the UST Program gets involved with the owner/operator of a facility, a release and some level of pollution/contamination has already occurred. The USTCA Program's efforts at obtaining compliance are centered around identifying the environmental harm and compelling corrective action necessary and commensurate with the risks to public health, safety and the environment.

The program utilizes an escalating enforcement strategy. The program tries to use the least resource-intensive enforcement activities first in most instances. Initial efforts focus on informal enforcement actions, such as warning letters, informal notices of violation, requests for additional information or corrective action plan submittal, staff field visits or follow up telephone calls in order to achieve voluntary compliance. These efforts are initiated by the program's technical staff case managers. More resource-intensive actions, such as formal Notices of Violation and Order, judicial actions, etc., are taken only when a lower-level enforcement action fails to achieve the desired response.

The type of enforcement response selected depends on the seriousness of the violation and the potential threat it poses to human health and the environment. Also considered is the current operational status of the source of the release (operational or nonoperational), the owner's cooperation and financial ability to conduct the required release investigation and corrective action.

**6. Compliance Tools Available and Used.** The program has a variety of tools to encourage and obtain compliance with the corrective action requirements of state law. The "enforcement tools" used range from informal to formal enforcement activities.

The program uses a number of informal "enforcement tools" to encourage UST owners and operators to comply with corrective action requirements. These informal enforcement tools include warning letters, personal meetings, informal notices of violations and the option of using the LUST Trust designation in cases of recalcitrance.

As stated above in 2) Program Goals(2), staff attempts to gain UST owners' voluntary compliance with the corrective action requirements of law. The program works closely with owners of leaking USTs to determine if they can qualify for partial remediation cost reimbursements through the Petro-Fund. If the tank owner is/was in compliance with the UST Program law and rules when the release was discovered, the Petro Board is authorized to reimburse a portion of the eligible leak investigation, remediation and 3rd party damage costs up to \$1 million per release. The first \$35,000 in costs are cost shared 50/50 with the tank owner. In general, the USTCA Program has not needed to take strong enforcement measures to achieve compliance with the corrective action requirements due to the availability of the Petro-Fund and the rules for access to the fund.

In the event of 1) a complaint or release that cannot be causally linked with a specific tank source, 2) an identified but financially insolvent liable tank owner, or 3) an identified but recalcitrant liable owner, the USTCA Program utilizes a combination of enforcement authorities from the Hazardous Waste and Underground Storage Tank law and the CECRA Act to compel compliance or to take unilateral state investigation and remediation action. State action is cost recoverable, plus up to twice actual costs for damages, against the responsible party(ies) in accordance with the provisions of CECRA and federal law (RCRA SubTitle I). The agency utilizes these provisions to encourage responsible parties to conduct their own investigations/remediations in accordance with program requirements. Otherwise, state efforts

with public (mostly federal) funds are prioritized based on potential or actual harm and endangerment to the public and the environment and, to a lesser extent, on the likelihood of cost recovery. Legal enforcement against insolvent or bankrupted responsible parties is not practical, as the agency may exert considerable legal resources to pursue parties with no ability to pay for cleanup costs. However, the use of public funds may be absolutely necessary in cases of severe actual or potential impacts.

#### Informal enforcement activities

- Warning letters
- Follow-up meetings, phone calls
- Follow-up inspections
- Informal notices of violations

The following stricter, more resource-intensive formal enforcement activities are taken when efforts to gain voluntary compliance have been unsuccessful:

#### Formal enforcement activities

##### Administrative remedies

- Formal Notices of Violation;
- Administrative Orders;

##### Judicial remedies

- Civil actions (court ordered corrections, penalties)
- Injunctions

The program has statutory authority (§75-10-423, MCA) to utilize administrative civil penalties. The DEQ has prepared, but not adopted, administrative rules which will implement a field citation program. The agency also has authority under CECRA (MCA Sec 75-10-714) to utilize administrative civil penalties for certain situations.

The menu of tools used by the UST Corrective Action program is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest single incentive for compliance with the Underground Storage Tank Corrective Action rules and regulations are for owners and operators to maintain eligibility for potential Petro-Fund reimbursement if petroleum release occurs at their facility. This is clearly a strong incentive as cleanups can easily exceed the \$17,500.00 copayment requirements ("deductible") of the Petroleum Fund.

#### **Agency-Generated.**

- Tank owners (generally) are only eligible for state-provided financial responsibility and partial corrective action cost reimbursement if they are found to be in compliance with tank management and release prevention requirements.
- The agency has cost recovery authority up to costs plus twice agency costs if the state is forced to remediate the site using the federal LUST Trust Fund.
- The presence of regional program offices in Billings and Polson.

**Industry-Generated.**

- Property valued as an asset or liability depending on status of facility remediation or "clean bill of health".
- Real estate property transfers/fiduciary concerns.

**Other.**

- Threat of financial ruin and 3rd party suits from undetected or unremediated releases possibly causing catastrophic impacts to ground water or adjoining properties.
- Danger of fire or explosion from vapor migration and accumulation.

STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/T.A.: Program Info on NRIS	The UST Corrective Action Program is compiling soil and ground water information from throughout the state as a result of remedial investigations conducted by tank owners/operators and agency LUST Trust investigations. The NRIS system at the State Library is 1) a computerized inventory of natural resource data, and 2) a network for accessing existing public computerized data banks throughout government. USTCA data is not yet in a user friendly NRIS format or retrievable, but it may be added to the NRIS database in the future.	staff	NA
On-site Technical Assistance  -Local Government Training	The USTCA Program has local contracts with county health offices to pay for corrective action oversight at leaking UST sites. Periodic town meetings are conducted by UST Release Prevention and UST Corrective Action programs to educate communities on regulatory requirements. Periodic public meetings conducted by LUST Trust staff in response to community concerns at specific sites.	staff	
-State Efforts	Upon notice of a release, staff respond as necessary to assist tank owner/operator in developing remedial response. The program has 20.2 FTEs assigned to corrective action investigations, enforcement and compliance efforts.	staff	cummulative to April '96 2746
Technical Seminars	Trade conferences and training workshops are offered or attended regularly. Agency holds an annual Consultant's Day Conference to educate remediation firms on the requirements.	staff	4-5
Comprehensive Planning/Withdrawals:	Not authorized		

STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Permits\Certification\Bonds	No USTCA permits are required; however, during some UST remediation efforts, tank owners may be required to obtain discharge/disposal permits from the DEQ, Water Quality Division, the Waste Management Division and/or the Air Quality Division, depending on the substance involved and the selected method of treatment or disposal.	DEQ staff, advice from USTCA staff	unkn.
Certification\Bonds	Not authorized		

STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> -Informal  -Formal monitoring reports  -Compliance inspections	<p>No informal inspections. The program is typically in a response mode to an environmental release. Essentially, all inspections are formal investigations to determine the extent and magnitude of the contamination. See also "Compliance inspections" below.</p> <p>Required as the result of remedial investigation/cleanup work plans. Status reports of remediation efforts are required to be submitted quarterly, or semi-annually. Compliance monitoring may be required for up to 2 years following required corrective actions.</p> <p>Ad hoc; environmental risk or complaint driven. Staff will conduct inspections of ongoing remediation efforts and follow-up inspections of compliance and enforcement requests or orders. In response to a unknown source release, staff can inspect facility leak detection or other records to help determine source.</p> <p>Agency must be notified by tank owner/operator of release within 24 hours of tank release discovery.            Agency must receive summary report of initial leak response and abatement within 30 days of discovery.            Unless waived by USTCA Program, a site history report must be submitted within 30 days of discovery.</p> <p>Agency authorized to enter and inspect facilities at reasonable hours upon presentation of credentials to sample materials, wastes, soil, water, or copy records etc, if agency believes there is noncompliance or in order to enforce law, rules or order.</p>	<p>staff</p> <p>staff</p> <p>staff</p> <p>staff</p> <p>staff</p>	<p>-</p> <p>2600 +</p> <p>1000 +</p> <p>323</p> <p>50-100 per year</p>

# STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Administrative Notices/Orders:</b> Notice of Violation -Warning Letter  -Informal issued within 30 days of violation discovery  -Formal issued within 90 days of discovery	<p>Issued for minor violations (i.e. failure to conduct a remedial investigation; late reporting) and when:            1) compliance is anticipated/expected, or 2) environmental risks are minimal.</p> <p>Issued for violations requiring corrective action and requesting submittal of action plan by date certain, with warnings of follow-up enforcement responses for noncompliance. Copies of Notices of Violations (NOVs) are submitted to the Petroleum Tank Release Compensation Board.</p> <p>Issued if no response to informal actions and with formal citations of law. May include order to conduct corrective action.</p>	<p>staff</p> <p>staff</p> <p>Director UST legal staff</p>	<p>300 through '95</p> <p>5</p> <p>0</p>
<b>Administrative Orders</b>	<p>May be issued to compel a remedial investigation, submittal of compliance plan, or to correct a violation of law or rule (MCA 75-10-413). Order becomes effective in 30 days unless recipient requests a hearing before the Board of Environmental Review.</p>	<p>Director</p>	<p>0</p>
<b>Cleanup orders-</b>	<p>Issued for unlawful discharges of regulated substances requiring cleanup, treatment or removal. (MCA 75-10-416).</p>	<p>staff</p>	<p>0</p>
<b>Agency actions</b>	<p>Under CECRA provisions (MCA 75-10-711 &amp; 715) after written notice to responsible party and failure to act in a timely manner, agency may use federal LUST Trust funds to conduct remedial investigation and/or remediate site.</p>	<p>UST CA Program Manager</p>	<p>50 total to date</p>
<b>Emergency Actions</b>	<p>Agency may take unilateral action without required notice to the responsible party in the event of an imminent and substantial danger and the responsible party can/will not act properly and expeditiously. Notice to liable party must be given 5 days after agency action.</p>	<p>Director</p>	<p>ave. 1 per year</p>

STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Admin. Penalties/Sanctions: Notice of Violation/Proposed Penalty (NOVPP)	<p>Authorized under MCA 75-10-423 for violations of UST law or rules adopted under MCA 75-10-401 et.seq. Maximum penalty \$500\violation.</p> <p>Authorized under CECRA (MCA 75-10-714) for failure to comply with an order to</p> <p>1) remediate a release or threatened release which may pose an imminent and substantial threat to the public health, safety or welfare or the environment or</p> <p>2) to provide consent for information gathering and site access relevant to a release or threatened release.</p> <p>Maximum administrative civil penalty \$1000\violation.</p>	<p>staff; not yet implemented</p> <p>Director</p>	<p>0</p> <p>0</p>
NOV Modification Penalty waiver	<p>Established through matrix adopted by pending rule allowing for gravity of violation, harm, and corrective action taken.</p>	Director	0
	<p>Under CECRA (MCA 75-10-714), agency required to consider nature, circumstances, extent, and gravity of the non-compliance and violator's ability to pay, any prior history of such violations, degree of culpability, and economic benefit or savings.</p>	Director	0
Opportunity for Conference/ Hearing	<p>To contest alleged violation or to request mitigation of penalty. Hearing conducted as a contested case under the provisions of the Mont. Admin Procedures Act (MAPA).(MCA 75-10-423)</p>	Director	0
	<p>Also under CECRA (MCA 75-10-714) hearing on penalty is subject to judicial review under the provisions of MAPA.</p>	Director	0



**STATE COMPLIANCE/ENFORCEMENT TOOLS --UNDERGROUND STORAGE TANK CORRECTIVE ACTION**

<b>Tools Authorized, by Category</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Civil Judicial Action:</b>  Injunctions	For violations of UST and or CECRA law, rules, orders of agency or the Board of Environmental Review. Maximum \$10,000\violation\day.  To require compliance with law, rule, or order of the department or the Board of Env. Review; to immediately restrain unauthorized activity endangering or causing damage to public health or environment; to avoid imminent hazard endangering public health or environment.	Director  Director	0  0
<b>Criminal Judicial Action:</b>	Not authorized for UST Program in Montana Hazardous Waste and Underground Storage Tank Act or the CECRA Act.	NA	NA

**8. History of Compliance.** Trends in compliance with the UST Corrective Action Program rules and requirements are illustrated below. The program implemented minimal federal EPA requirements for corrective action and utilized state water quality and CECRA requirements prior to 1989. Since then, the federal and state UST Program corrective action rules have been developed and the state Petro-Fund reimbursement program was established. Compliance history for the program does not extend significantly back beyond 1989.

Through the end of 1995, program staff have identified a total of 2,654 UST releases and closed 1,372 releases (Figure 1 and Table 1). These include active in-use USTs where leaks were discovered through tank testing and monitoring, vapor migration or ground water contamination complaints, excavation of nearby properties or by other means, as well as discoveries of after-the-fact releases from the estimated 15,793 USTs which have been removed from the ground since 1984. As of April 1996, a total of 2,746 releases were identified, and 1,441 resolved to the agency's satisfaction. Currently, 1,305 releases are still active in terms of needing additional or ongoing monitoring or other corrective action efforts.

**Table 1**  
**1995 USTCA Program - Confirmed Release Compliance Requests**

Year*	Total Confirmed Releases**	Owner/Operator Responded-Releases Resolved at Year End	Active Releases at Year End	LUST Trust Actions Taken/ (Emergency Responses) <sup>1</sup>	Informal NOV's Written
1988	45	4	41	3/1	NA
1989	142	12	130	7/1	NA
1990	344	104	266	7/1	NA
1991	441	197	360	8/0	NA
1992	474	261	332	7/1	NA
1993	504	273	371	7/1	NA
1994	419	318	333	6/1	6
1995	323	203	275	5/1	5
Totals	2654	1372	NA <sup>2</sup>	50	11

**\*Year Statistics not cumulative**

**\*\*See Figure 1**

**Notes:** 1 - Emergency Responses are a subset of the total number of LUST Trust sites  
2 - Not a total

**source:** Kuhn, 1996.

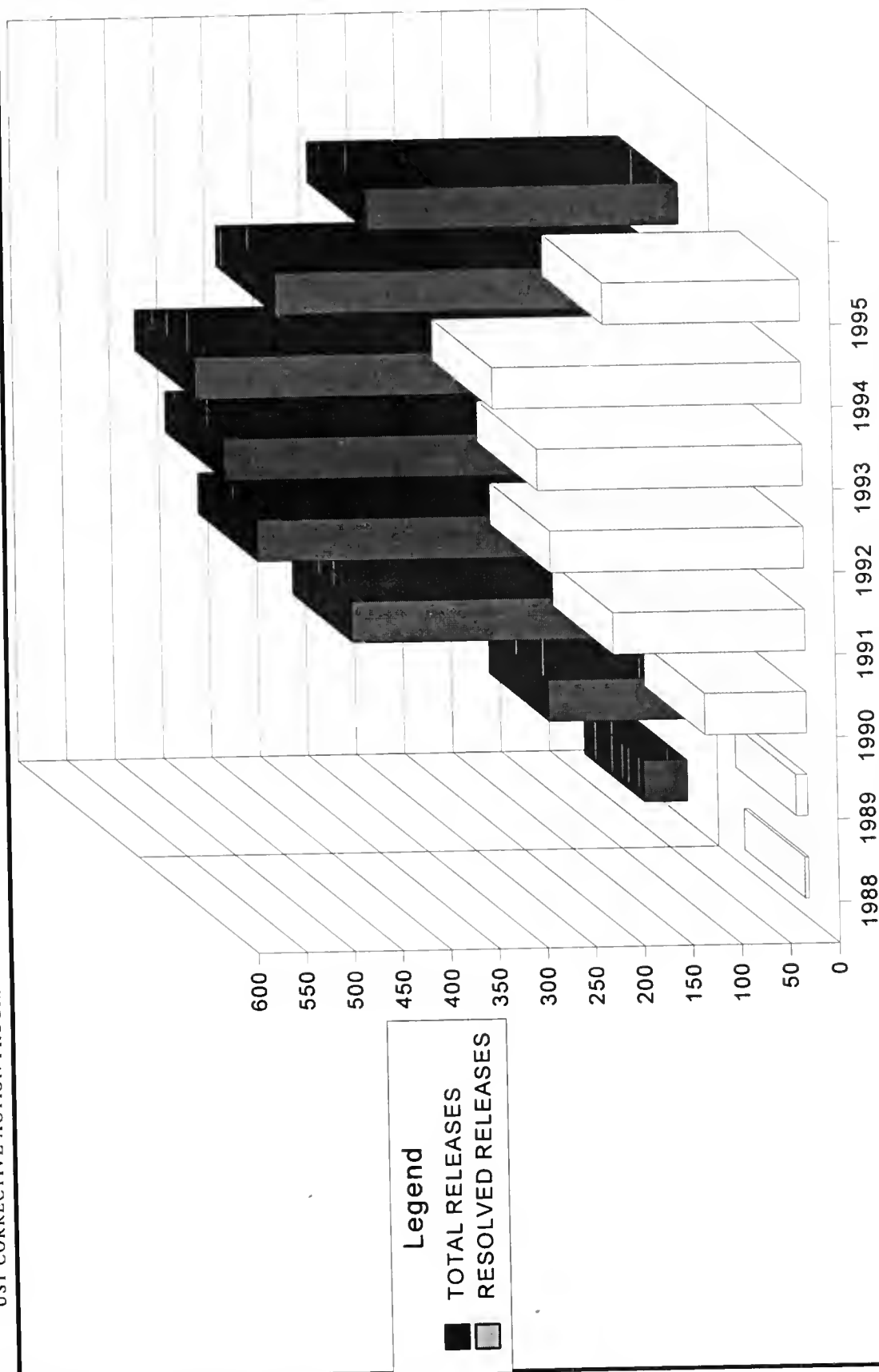
**Dept. of Environmental Quality**

**Environmental Remediation Division**

UST CORRECTIVE ACTION PROGRAM

**FIGURE 1**

**ANNUAL RELEASE STATISTICS**



**9. "Violations."** The UST Corrective Action Program has no written policy establishing a hierarchy of violations. The program has adopted as standard operating procedure that the following violations are most serious because these deficiencies are most often responsible for releases occurring and they may exacerbate the severity of the release:

1. Failure to promptly report a release.
2. Failure to take emergency release response action.
3. Failure to recover free product.
4. Failure to conduct a remedial investigation and implement corrective action.
5. Failure to submit required remedial investigation or corrective action documentation and progress reports.

The average number of violations identified per year by the USTCA Program is 100-150. Approximately 90% of the violations are the failure of the tank owner/operator or the owner's remediation consultant to submit required documentation or corrective action work plans within specified time frames. These do not typically result in formal enforcement but are pursued through request and warning letters.

Failure to notify the department of a release within 24-hours of discovery represents a significant compliance violation that may result in loss of Petro-Fund eligibility and potential civil action by the department. To date 7 sites have been denied Petro-Fund eligibility for failure to report a release within 24 hours. The department has initiated civil enforcement actions against some sites where this has occurred due to the increased severity of contamination that could have been otherwise prevented had the party notified the agency of the existence of the release within 24 hours of its discovery.

Other violations from 1994 through 1995 resulted in approximately 11 informal notice of violation letters and 6 formal enforcement actions including administrative orders and civil suits. All of the 11 NOVs written by the program from 1994-1995 represent responsible parties who failed to address investigation and cleanup of their releases within time frames required by the department. The UST Corrective Action Program views this as significant due to the potential for petroleum to migrate off-site and impact down-gradient utility corridors. Such migration could lead to substantial endangerment of human health, fire or explosion. In addition, uncontrolled petroleum releases cause increased environmental and property damage that may impact local real estate values. Increased cleanup expenses in such scenarios may not be eligible for Petro-Fund reimbursement if it can be shown that damage from the release could have been minimized if proper action had been taken immediately. The Petroleum Tank Release Compensation Board, which administers the Petro-Fund, has authority to deny eligibility for any site that does not remain in compliance with all applicable federal and state UST requirements.

The FY 94 and 95 list of Underground Storage Tank Corrective Action formal and/or informal and violations is shown below in Table 2.

**Table 2**

**USTCA Program Violations, by Type and Status**

<b>NOV Sent</b>	<b>Desc.of Violation</b>	<b>Type of Operator</b>	<b>Penalty Assessed</b>	<b>Admin. Order Sent</b>	<b>Status at Year End</b>
2-09-94	failure to complete RI *	Commercial UST	no		resolved by program
2-09-94	failure to submit RI work plan	Commercial UST	no		resolved by program
2-09-94	failure to complete RI	former commercial UST	no		resolved by program
4-26-94	failure to submit RI work plan	Commercial UST	no		resolved by program
7-05-94	failure to complete RI	Commercial UST	no		resolved by program
9-12-94	failure to complete RI	Commercial UST	no		resolved by program
5-11-95	failure to continue with cleanup	Commercial UST	no		resolved by program
5-20-95	failure to complete RI	Commercial UST	no		resolved by program
6-06-95	failure to submit RI work plan	Commercial UST	no		resolved by program
8-14-95	failure to submit RI work plan	Commercial UST	no		resolved by program
Admin Order: 9-10-95	failure to remove USTs and investigate suspected releases	Commercial UST	no	9-10-95	LUST Trust Action, AO** resolved by Director
8-17-95	failure to submit RI work plan	Commercial UST	no		resolved by program

\* Remedial Investigation

\*\* Administrative order

1994 Total Resolved NOV/AOs: 6, Pending 0

1995 Total Resolved NOV/AOs: 6, Pending 0

source: Kuhn, 1996.

**Discovery of Violations.** UST release violations can be discovered in a number of ways. They may be discovered and notified to the Corrective Action Program by local or state licensed UST inspectors, equipment tightness testers or service personnel, fire officials, citizen complaints or soil and ground water analytical laboratory sample results submitted for UST closures. Complaints are followed up and verified by either UST Release Prevention or Corrective Action Program staff. On-site soil, water and product samples are collected and sent to analytical laboratories as appropriate. Field activities are documented and photographs are taken when necessary. Most importantly, UST owners/operators are required by law to notify the agency within 24 hours of discovering a tank release.

Procedural violations, such as failure to submit required corrective action plan proposals or field activity progress reports become apparent to the USTCA Program case manager and on the database tracking system, established for each release incident. Corrective Action Program and Petro-Fund personnel routinely visit UST facilities during the cleanup process and will document any violations that are observed.

Significant violations in the USTCA Program are primarily discovered through agency review of confirmed release cases, as shown below.

<b>Violations Discovered (NOVs/AOs), by method, 1994</b>					
<b><u>Group</u></b>	<b><u>Total</u></b>	<b><u>Agency Review of Monitoring Reports</u></b>	<b><u>Self-Reporting of Violation</u></b>	<b><u>Citizen Inspection Complaint</u></b>	
Commercial (retail)	6	4	0	2	0
<b>Violations Discovered (NOVs, AOs) by method, 1995</b>					
<b><u>Group</u></b>	<b><u>Total</u></b>	<b><u>Agency Review of Monitoring Reports</u></b>	<b><u>Self-Reporting of Violation</u></b>	<b><u>Citizen Inspection Complaint</u></b>	
Commercial (retail)	5	5	0	0	0
Private business	1	0	0	1	0

**10. Considerations in Calculating Penalties.** The USTCA Program's enforcement policy contains a penalty calculation matrix which factors background, environmental, economic benefit, gravity-based, and violator-specific components into the determination of a target penalty. The program has a written Enforcement Procedures Guidance Manual developed as part of its EPA grant obligations which provides guidance for penalty calculations. The program's enforcement guidance provides for consideration of the frequency of violations in selecting an appropriate enforcement response. Frequent or continuing violations warrant an increased level of enforcement response. The program uses a formalized UST Corrective Action Program Case Management Priority Ranking Schedule and form to rank facilities for severity of threats to human health and the environmental. Sites which rank as a high priority for case management oversight are also considered high for judicial enforcement. The ranking form is used to objectively evaluate sites for case management priority and judicial enforcement if the owners become recalcitrant.

The proposed draft administrative civil penalty rules for the USTCA Program contains a penalty calculation methodology based on the economic benefit of noncompliance, gravity or seriousness of harm, past compliance history, cooperation, and negligence.

**11. Resolution of Noncompliances.** All formal enforcement requests must be approved by the Division Administrator and Director prior to the initiation of any formal enforcement action. Program policies are in place that establish how enforcement activities are to progress. Program staff have been instructed as to what informal enforcement efforts are to be made before formal enforcement activities are invoked. Further, the program maintains a database module which cross-references violations with compliance activities. The review of data which has been entered into the module allows program staff to monitor compliance progress and provides program management the capability to periodically review the status of program-wide compliance/enforcement activities.

**12. Current Compliance Priorities.** Agency staff have identified the following enforcement/compliance efforts as priorities for the Underground Storage Tank Corrective Action program:

- Immediately respond to all UST releases with associated high risks to human health. This typically includes any known or potential human exposure to contaminated groundwater used as a drinking water supply, human exposure through vapor inhalation, and risks associated with fire and/or explosion due to the buildup of petroleum vapors in confined spaces (utility corridors, crawl spaces, basements).
- Respond to UST releases that threaten the environment or pose a hazard to surface and groundwater not immediately used for drinking water purposes.

Agency staff have identified the following key priorities for their enforcement/compliance program over the next 12 months.

- Adopt rules to implement the draft UST administrative penalty provisions.
- Hire and train new staff.
- Continue priority ranking of new releases and identify human risks posed by releases.
- Establish a cost-recovery program in the LUST Trust Fund to recover federal monies expended at LUST Trust sites. Identify and initiate necessary enforcement activities at these sites.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** Montana has received federal program approval from the Environmental Protection Agency for the UST program. This means DEQ has primacy for the regulation of the underground storage of regulated substances in the state of Montana, except within the boundaries of the state's seven Indian reservations. Although program approval has been granted, the EPA will maintain an oversight role to insure that Montana's program operates in a manner which is at least equivalent to federal standards and requirements. The receipt of federal UST Program Assistance Grant and LUST Trust funds also creates quarterly and annual reporting requirements.

Unlike other RCRA programs, the EPA developed the Underground Storage Tank Program to be a "franchise" program. In developing the "franchise" concept, the EPA envisioned that its role would be to assist in the development and support of viable state programs which would totally supplant the federal UST program.

The EPA estimates that the Office of Underground Storage Tanks will cease operation in 2001.

Regional EPA offices will pick up some of the national office's duties and responsibilities at that time and continue to provide limited support to state programs. Federal grant oversight requirements require that the EPA state project office must conduct mid-year and year-end reviews of the program's activities. The program has negotiated a Cooperative Enforcement Agreement with the EPA. Compliance and enforcement activities are reviewed in relation to the annual workplan which is developed as part of the State/EPA Agreement. Records of such activities must be provided for EPA review.

The UST Corrective Action Program is responsible to the EPA for the accountability of the expenditures from the federal LUST Trust funds. For example, there are criteria established, defining appropriate uses for the funds, and there are federal requirements that LUST Trust expenditures be cost recovered from the responsible party whenever possible.

**Partnerships.** The Underground Storage Tank Program has entered into a Cooperative Agreement with the Assiniboine and Sioux Tribes to jointly regulate underground storage tanks on the Fort Peck Indian Reservation.

By rule, the USTCA Program offers local government units 15 days in which to provide comments regarding proposed corrective action work plans for sites within their jurisdictions. Also, copies of the final corrective action reports are required to be submitted to local governments for review and comment.

**Delegated Authority.** The USTCA Program has delegated inspection authority to local government units where possible. The state/EPA cooperative agreement provides for this, as does state law. The program utilizes the services of personnel employed by local health departments, fire departments and rural fire districts. The UST Program currently has contracts with 32 local governmental agencies. At the direction of the USTCA Program, these agencies may conduct compliance inspections, take samples, and conduct follow-up inspections for on-going remediation efforts. Individuals who carry out these duties are not licensed by the USTCA Program but typically hold a Remover/Installer License issued by the UST Release Prevention Program.



## RECLAMATION DIVISION

The mission of DEQ's Reclamation Program is to administer and enforce Montana's mined land reclamation statutes and facilitate reclamation of abandoned mines. Budget, funding source, and staffing information (pre-reorganization) for Reclamation is provided below.

	Funding Source, FY 96						Total	
	General	Recl.	Hardrock	Bond <sup>1</sup>	DEQ <sup>1</sup>			
<u>Program/Activity</u>	<u>Fund</u>	<u>Dvlpmnt.</u>	<u>Fund</u>	<u>Forfeiture</u>	<u>EIS</u>	<u>Federal</u>	<u>Funds</u>	<u>FTE</u>
Admin.		\$71,800					\$71,800	1.1
Opencut	69,700	181,300	15,500				266,500	4.5
Coal/Uranium		233,000				819,100	1,052,100	18.4
Aband. Mines						4,932,100	4,932,100	9.0
Hard Rock	341,400	431,500	50,000				822,900	14.4
Env. Analysis					1,329,400		1,329,400 <sup>1</sup>	3.5
Bond Forfeitures				50,000			50,000 <sup>1</sup>	NA
TOTAL (FY 96)	411,000	917,700	65,500	50,000	1,329,400	5,751,200	NA	50.9
TOTAL (FY 90)	312,900	612,400	100,000	100,000	500,000	8,749,700	10,374,900	42.0

### Notes:

- 1 These accounts reference half of the funding amount for the biennium and not an annual appropriation. They are spending authority only; actual funds are typically available only when a bond has been forfeited or an applicant is submitting MEPA fees for a specific project over the course of the biennium.

sources: Olsen, 1996; LFA, 1995, 1989.

## Legislative History

Events important to the compliance/enforcement elements of the Reclamation Program are summarized below.

1967/

1969 Legislation enacted to "encourage" reclamation in Montana. College of Mineral Sciences and Technology authorized to enter into contracts with miners wishing technical assistance with reclamation.

1971 Legislature determines that voluntary reclamation is inadequate and enacts more specific and stringent permitting and reclamation requirements; passes the Metal Mine Reclamation Act (MMRA) and Montana Open Cut and Strip Mine Land Reclamation Act. Legislature also enacts the Montana Environmental Policy Act (MEPA).

1973 Legislature amends the two reclamation acts and splits them into the three current statutes; the Strip Mine Act, the Open Cut Act, and the Metal Mine Reclamation (Hard Rock) Act.

1974 Legislature passes the Montana Mine Siting Act.

1975 Strip Mine Act amended to include underground mining and is retitled as the Montana Strip and Underground Mine Reclamation Act.

1977 Federal Surface Mining Control and Reclamation Act (SMCRA) enacted (applies only to coal).

1979 Montana Strip and Underground Reclamation Act amended to be as effective as the federal coal

law.

- 1980 Montana given federal approval to enforce both state and federal coal law in Montana.
- 1985 MMRA modified to include: annual certification required of small miners; small miners may be assessed penalties for violating conditions of the exemption; provides for writ of mandamus, and action for damages to water supplies; required compliance with Hard Rock Impact Act (administered by the Montana Department of Commerce); and a section regulating custom mills was added.
- 1989 Legislature modified MMRA to require bonds for new placer and dredge operations and require operating permits for small miners using cyanide; establishes procedure for blasting complaints; and identifies activities prohibited if a bond has been forfeited.
- 1991 Legislature modifies the MMRA to:
- . clarify that operators must pay a civil penalty for violations of provisions of any license or permit,
  - . provide for immediate suspension of a permit when a violation is creating an imminent danger to the health and safety of persons outside the permit area,
  - . prohibit areas reclaimed by a permittee, or any state or federal agency from being mined under a small miners' exclusion,
  - . require a permittee to identify directors and owners of more than 10 percent share,
  - . require a permittee to provide a certification of compliance with air and water quality laws, and
  - . authorize the Department to abate environmental emergencies and recover costs.
- 1993 MMRA was amended to require persons to pay outstanding penalties and outstanding reclamation costs, and comply with outstanding compliance orders prior to receiving a small miners exclusion, exploration license or operating permit.
- 1995 MMRA modified to authorize administrative assessment of penalties, increase the ceiling on penalties for significant violations, clarify the steps of the enforcement process, and allow for formal appeal of violations and penalties.

# Open Cut Program

Montana's constitution makes it clear that all lands disturbed by the taking of mineral resources must be reclaimed. Both state and federal law provide for permitting, inspection and enforcement, public involvement, and selective denial. The Open Cut Mining Act regulates and requires reclamation of land mined for sand, gravel, bentonite, clay, phosphate rock, and scoria, by any party, on any land (except tribal) in Montana.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Open Cut Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. IX, Sec. 2** notes that all lands disturbed by the taking of natural resources shall be reclaimed, and the legislature shall provide effective requirements and standards for the reclamation of lands disturbed.
- **Montana Open Cut Mining Act (OCMA)** (MCA 82-4-402, et. seq.) provides for the reclamation and conservation of land subject to open cut mining.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)
- **Montana Dam Safety Act** (MCA 85-15-105, et. seq.)

Related federal authorities:

- **National Environmental Policy Act (NEPA)**
- **Surface Mine Control and Recovery Act (SMCRA)**
- **Organic Act and National Forest Management Act** (USFS-administered lands)
- **Federal Land Planning and Management Act** (BLM-administered lands)

Open cut administrative rules:

- ARM 26.4.201-.207

Specific enforcement authority:

- MCA 82-4-441
- ARM 26.4.207

**2. Program Goals.** Based upon the above-referenced guidance, the Open Cut Program goals are the reclamation and conservation of land subject to mining, as well as the following:

1. Effectively, consistently, and fairly administer the Act by working with industry, landowners and concerned citizens to ensure reclamation while not promoting excessive regulation.
2. Provide and retain technically competent staff who are possessed with exemplary communication skills that allow a free exchange of ideas and who are able to accept or offer alternatively effective reclamation methods or actions.

**3. Program Activities.** The Open Cut Program is responsible for making mine permitting decisions (approval, denial, or modification) on permit applications, for operation monitoring, and for providing reclamation oversight on all mining of sand, gravel, scoria, clay, bentonite, and phosphate rock. The Open Cut Mining Bureau is organized around a central office in Helena with satellite offices in Billings and Kalispell. Reclamation Specialists in each of the three offices maintain areas of responsibility by region: central, western, and eastern. The Bureau Chief is stationed in Helena and retains most administrative and decision making authority. That position also assists the reclamation specialists in their duties when workload is excessive or issues complex or controversial.

Program resources and demands are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr<sup>2</sup></u>
Billings	47,158	1.0	9	819	(see total)	70
Helena	173,236	2.0	18	645	(see total)	60
Kalispell	46,107	1.0	6	718	(see total)	70
<b>TOTAL</b>	<b>\$266,500</b>	<b>3.0</b>	<b>8.5</b>	<b>2,182</b>	<b>14.2<sup>3</sup></b>	<b>200</b>

Notes:

- 1 Does not include 0.5 administrative FTE in Helena.
- 2 Refers approximately to last 5 years.
- 3 30,000 total acres under permit, divided by 2,100 permits.

source: Welch, 1995, 1996.

**Fees and Charges.** Open Cut Program revenues from fees and charges are described below. The amounts of the nonvariable fees are set in statute.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Contract Application Fee <sup>1</sup> :	\$50	6,500	bonding shortfalls, research, administration
Additional MEPA Fees:	0	0	NA
Noncompliance Penalties:	varied	6,000-7,000	bonding shortfalls, research, administration
<b>TOTAL:</b>		<b>\$12,500-13,500</b>	

Notes:

- 1 Fees do not apply to state, County, city, or town projects.

source: Welch, 1996.

**4. Regulated Communities.** Open Cut mining regulations affect those open cut mine operators who remove a cumulative total (at one site or many) of 10,000 cubic yards of material or more. At this level of activity operations become regulated.

Consistent with the activities noted above, the Open Cut Program interacts with four primary regulated communities: government (primarily counties, but some cities and federal and state agencies), fixed-base operators, highway contractors, and bentonite miners. Additional information on those regulated through the Open Cut Mining Program is provided below.

At least one open cut mining operation exists in each of Montana's 56 counties, from low-elevation alluvial deposits, to high elevation glacial areas, to the bentonite fields of eastern Montana. Operations range in scale from 1 acre to over 1,000 acres in size. The total permitted acreage remains relatively constant over the years, with new operations' acreage replacing acreages released from bond.

Approximately 5% of the Open Cut contracts are for operations on federal lands, 5% are for operations on state lands, and 90% are on private lands. Approximately 25% of open cut operators are mining their own land; the remainder have received permission from the landowner.

The duration of an operation mined in conjunction with a specific highway project is typically 3-4 years; permanent based operations may last from 5-50 years. Most operators have 2-3 active operations at a time; the largest operator has 15 concurrent operations. A number of larger highway contractors have up to 60 operations at some stage of development or reclamation.

**5. Philosophical Approach to Compliance.** Program staff strive to maintain consistent, fair administration, together with a commitment to serve the regulated and non-regulated community; they offer solutions when possible, and enforcement when necessary. The program's primary goal is the reclamation of mined land; communication, cooperation, and trust often bear the most fruit. Legal actions are also a tool, but they should be the ones used least frequently and usually when environmental harm is effected and/or the violation shows irresponsible negligence.

**6. Compliance Tools Available and Used.** The Open Cut Program's formal inspection and enforcement procedures are documented in their *Policy and Procedures Manual*, in place since 1987, and last revised in 1990 with the addition of form changes. Other changes in document preparation have taken place periodically. The menu of tools used by the Open Cut Program to achieve their natural resource/environmental mandates is shown beginning on the next page. Abbreviations used in the "Authority" column refer to the following:

Admin.	Division Administrator
Bur. Chief	Bureau Chief
NA	Not Applicable
recl. spcl.	Reclamation Specialist
Legal staff	Member of DEQ Legal staff
NR	Not Recorded

**7. Incentives for Compliance.** According to program staff, the strongest incentives for compliance with Open Cut regulations are agency-generated, because none of the operators "enjoy" receipt of NOV's and civil penalties, even though the penal amount may seem insignificant. They feel that there are a certain number of operators who would comply and do an excellent job of reclamation without government monitoring. For some however, even though not necessarily correct, they feel compliance costs money and they lose any economic advantage for the bid process and/or profit.

STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPEN CUT MINING			
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Education/Information/T.A.:</b> Presentations at gatherings Informal Discussions w/Equipment Operators Informational Packet On-Site Technical Assistance	<p>On request and/or when resources are available; presentations have been made to contractors associations, county road foremen, and the Highway Department.</p> <p>Upon request; done individually or in groups, often in winter months. Ongoing process.</p> <p>Issued upon request. Includes relevant forms, as well as assistance handouts related to plans of operation, ponds, seed mixes, bonding levels, and mapping. Many opportunities to provide on-site technical assistance occur during inspections, and these opportunities are taken advantage of.</p>	<p>recl. spcl.</p> <p>recl. spcl.</p> <p>NA</p> <p>recl. spcl.</p>	<p>2</p> <p>NA</p> <p>NA</p> <p>NA</p>
<b>Comp. Planning/Withdrawals:</b> (None noted)			

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPEN CUT MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>Permits/Certifications/Bonds:</b> 1,000-yd. Exemption</p> <p>Application for Mined Land Reclamation Contract</p>	<p>If operator holds a Mined Land Reclamation Contract, they may mine a site of 1,000 cubic yards or less, solely on notifying the department and having a "Short Form" on file for the proposal. A bond is not required.</p> <p>Requirement to request contract triggered by operator's mining activity exceeding or planning to exceed 10,000 cubic yards of material removed (cumulatively, at one or more sites); requirement also applies to anyone proposing to disturb previously reclaimed (open cut) mined land. Application requires an application form, \$50 filing fee, completed contract, reclamation and operation plan, map(s), and a bond.</p>	recl. spcl.	+30
<p>Staff Notification of Incomplete Application</p> <p>Reclamation Bond/Surety</p>	<p>Staff should notify applicant of any missing application items within 5 days of receipt of application.</p> <p>All applications (except government) must include a bond to ensure reclamation in accordance with the reclamation plan. Typically, the bond amount is calculated by the applicant, based upon Department guidelines. All acreage within contract area must be bonded. A minimum of \$200 per acre, and \$1,000 per contracted site, is required. To proceed, program staff must concur with the applicant's calculations.</p>	NA	142
<p>Staff Review of Completed Application</p> <p>Pre-Mine Evaluation</p>	<p>Staff try to ensure all required items have been addressed within 5 days from receipt of a complete application.</p> <p>Date set within two weeks of receipt of completed application. Evaluation includes an on-site review of the proposed mine site and surrounding lands, as well as proposed operation and reclamation.</p> <p>Environmental Assessments or supplements are done for all proposed mine sites. Target time is 5 days after the on-site evaluation.</p> <p>Held if significant public concern is evident.</p> <p>If the proposal meets statutory requirements and related regulations.</p> <p>If the proposal fails to meet statutory requirements and related regulations, including providing assurance that specific parameters requires in reclamation can be met (see MCA 82-4-434). Program staff must also take into account the effect on taxable values on adjacent property.</p>	recl. spcl.	120
<p>MEPA Review</p> <p>Notif. Needed Changes</p> <p>Public Meeting</p> <p>Contract Approval</p> <p>Contract Denial</p>		recl. spcl.	NA
		recl. spcl.	187
		recl. spcl.	187
		recl. spcl.	NA
		recl. spcl	4
		Admin.	142
		Admin.	0

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPEN CUT MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Permits/Certif./Bonds (cont.):</b> Reclamation Plan Revision  Bond Revision  Contract Amendments	<p>Allowed (by statute) to occur annually, but should only be done if the old plan is so inadequate that reclamation is in jeopardy or the operation has changed from the original proposal. Department may periodically review the mining and reclamation and require modifications as necessary. Adjusted at request or by staff as necessary.</p> <p>Upon department approval; they typically cover 0-50 acres.</p>	Admin. recl. spcl.  Admin.	142 NR  45
<b>Monitoring/Inspections:</b> Informal (news, conversations) Self-Monitoring by Permittee Full-Site Inspections  Complaint-Generated Insp. Correction of Problems (Violation Avoidance)	<p>Performed continuously on ad hoc, time-as-available, basis. Monitoring (water quality and fluctuations generated by the project) and annual reports are required for sites operated in the calendar year. Authorized, but no required frequency; policy targets pre-mine, initial start-up, operating, and reclamation. Inspections may occur without notice to operator. They include evaluations of consistency with operation plans, whether the bond is still sufficient, and whether the reclamation plan is still valid. Some inspections are more intensive than others, but such differences are not tracked in program records.</p> <p>All complaints are responded to as time and potential harm dictate. There are not any rules that require time frames for response.</p> <p>If staff notice minor problem which is immediately corrected.</p>	NA NA  recl. spcl. recl. spcl. recl. spcl.	NA 10  ±500 NR NR
<b>Administrative Notices/Orders:</b> Post-Inspection Letter	<p>These are informal, agency-generated letters that detail observations potentially leading to a violations. They are sent to an operator after inspection, if problems are discovered, and include steps necessary to correct them, and a time frame to do so.</p>	recl. spcl.	NR



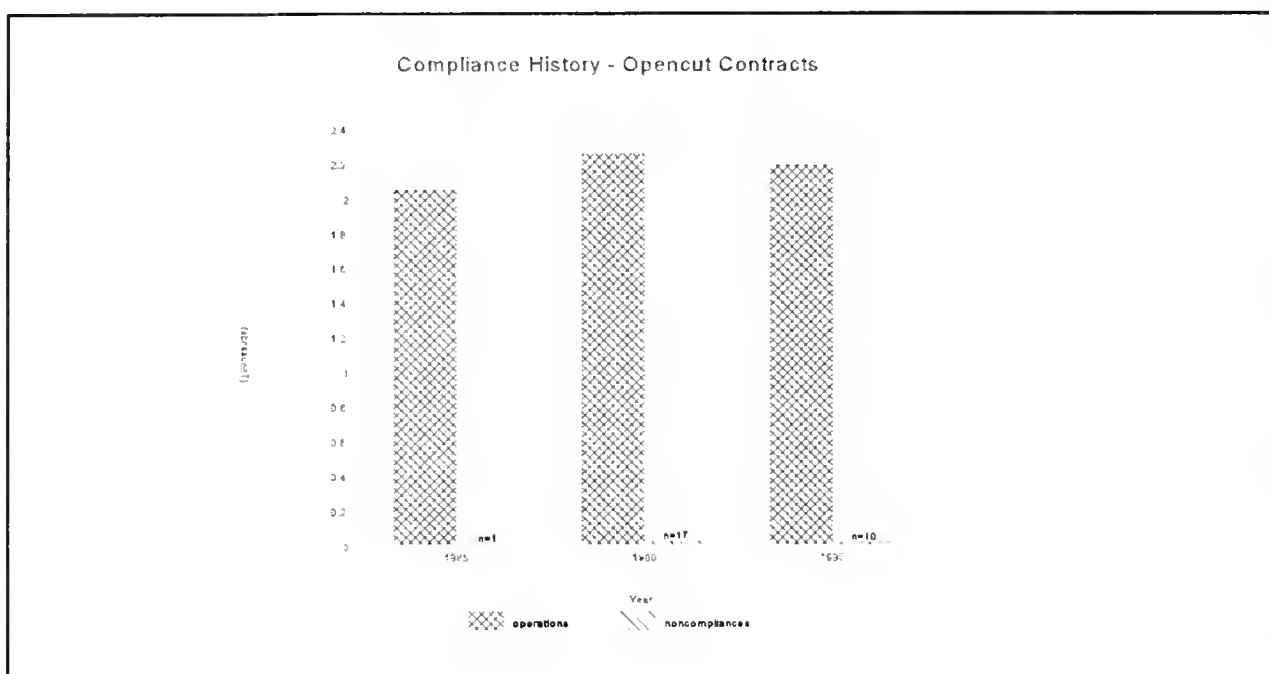
# STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPEN CUT MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Admin. Penalties/Sanctions:</b> Staff Recommendation - NOV Notice of Violation/Proposed Penalty (NOVPP)  Opportunity for Hearing  NOVPP Modification Penalty Waiver  Findings of Fact/Conclusions of Law and Order (FFCLO)  Release of Civil Liability(?) Bond Forfeit Contract Termination	<p>Upon staff determination of environmental harm, or a pattern of singular minor violations, or recurring or unabated administrative violations.</p> <p>Must be issued within 30 days of operator receipt of NON (includes "points" calculation for violation and amount of proposed penalty) NOVPP is prepared by legal staff; Bureau Chief recommends penalty amount.</p> <p>A formal or informal hearing must be requested by operator within 20 days of receipt of NOV. Hearing results in NOV being either affirmed, modified, or vacated.</p> <p>Following informal conference or formal hearing.</p> <p>Only where violation is minor and no harm to public health, safety, or the environment has occurred, and administration has not been impaired.</p> <p>(orders operator to pay penalty) Issued within 30 days of receipt of NOV, if no hearing is requested. Penalty must be paid within 30 days of receipt of FFCLO.</p> <p>Upon receipt of penalty payment, or issuance of Penalty Waiver.</p> <p>Upon failure to reclaim in accordance with Mining and Reclamation Plan.</p> <p>Upon mutual consent or 6-month notice to operator prior to termination.</p>	<p>staff</p> <p>Admin.</p> <p>Admin. Bur. Ch</p> <p>Legal Stf</p> <p>Legal Stf Legal Stf Admin. Admin.</p> <p>Admin. Admin.</p> <p>Admin.</p>	<p>12</p> <p>±10</p> <p>0 0</p> <p>7</p> <p>4 2 1 1</p> <p>0 0</p> <p>2</p>
<b>Civil Judicial Action:</b> Court Adjudication Suit to Enjoin Suit to Collect Damages (breach of contract)	<p>If operator does not pay penalty.</p> <p>Upon failure of operator to cease mining 30 days after being ordered to do so.</p> <p>May occur at the department's discretion upon operator failing to cease mining 30 days after being ordered to do so.</p>	<p>Admin. Admin.</p> <p>Admin.</p>	<p>0 0</p> <p>2</p>
<b>Criminal Judicial Action:</b> (Not authorized)			

**8. History of Compliance.** Generally, operators comply with open cut regulations, especially those who have been in the business for a number of years and/or operate multiple sites in response to road construction projects. There are, however, a large number of new open cut operators taking part in the increasing commercial, residential, and infrastructure development in many areas of the state. With many of these operators, the process becomes one of education. In some cases, there is adamant objection to compliance to any degree with mining regulations; these are more difficult cases to bring into compliance. Often the only tool that will work is that of the Notice of Violation and concurrent civil penalties.

The Open Cut Program generally issues 12-15 violations annually. To date, the program has forfeited 26 bonds, most due to financial difficulty situations (i.e. bankruptcy).

Trends in compliance with open cut rules and requirements are illustrated below. As shown, the number of contractees has remained relatively constant, and the number of noncompliances has remained



relatively low. As shown in this figure, there were over 2,000 contractees in 1985 and one noncompliance; in 1990, there were over 2,200 contractees and 17 noncompliances; and in 1995, there were about 2,200 contractees and 10 noncompliances. Program staff feel that both numbers and types of violations are stable. They note that it is possible that with the increasing number of operators supplying subdivision and infrastructure development, that some will be reluctant to comply with applicable mining and reclamation statutes.

**9. "Violations."** As noted in the "tools" table, open cut operators may be out of compliance, but if they correct the situation, they may not be issued a violation nor be penalized. The Open Cut Program defines a "violation" upon issuance of a Notice of Violation (NOV). Significant violations are defined as those which can not be waived.

During the 1995 calendar year, the Open Cut Bureau issued 10 NONs. There was one repeat violator in that time period. Both violation were for failure to enter into a Mined Land Reclamation Contract prior to commencing mining operations. The CY 95 list of open cut violations follows:

<u>Month NON Issued</u>	<u>Type of Operator</u>	<u>Desc. of Violation</u>	<u>1995 Open Cut Violations, by Type and Status</u>		
			<u>Penalty Assessed</u>	<u>Status at Year End</u>	<u>Significant Violation?</u>
Jan. '95	sand & gravel	No contract	\$400	unpaid	Y
Jan. '95	sand & gravel	No contract	\$400	unpaid	Y
Jan. '95	sand & gravel	No contract	0	vacated	N
Feb. '95	sand & gravel	No soil salvage	\$400	Released	Y
Feb. '95	sand & gravel	No contract	\$450	unpaid	Y
Mar. '95	sand & gravel	No contract	0	vacated	N
Mar. '95	sand & gravel	No soil salvage		unpaid	
		failure to reclaim	\$1,000	bnd forfeit	Y
May '95	sand & gravel	failure to reclaim	0	vacated	N
Oct. '95	sand & gravel	No contract	\$400	unpaid	Y
Oct. '95	sand & gravel	No contract	\$400	unpaid	Y

source: Welch, 1996.

**Discovery of Violations.** All violations in the Open Cut Program are discovered through inspections as shown below.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
Open Cut Miners	10	0	0	10	0

source: Welch, 1996.

**10. Considerations in Calculating Penalties.** The Open Cut program uses a "point" system to assess civil penalties. Points are assigned based on history, seriousness, negligence, and good faith, as described below.

1. **Operator's History of Noncompliance (no maximum number of points):**
  - A. Four points for each similar violation (i.e. soil salvage, failure to reclaim, etc.) in last three years.
2. **Seriousness of Violation (max. = 18 points; includes actual and/or potential harm):**
3. **Negligence (max. = 18 points):**
  - A. Ordinary Negligence (max. = 4 points),
  - B. Irresponsible Negligence (max. = 8 points),
  - C. Gross Negligence (max. = 18 points)
4. **Good Faith (potential of 8-point maximum credit)**

The Bureau's manual provides guidance in calculating points. Penalty amounts are \$50 (1996) per point, with a minimum of \$100, and maximum of \$1,000, per day. A "day" is a day the action occurred that

resulted in the violation (i.e. failure to submit a report is a one-time occurrence, thus is considered one day of violation, even if it takes two weeks to correct). Penalties for subsequent days that the violating activity occurs are assessed at the same rate.

**11. Resolution of Noncompliances.** There is no data recorded in this category, but as noted on previous pages, most violations are for operating without a contract, failure to reclaim, or failure to salvage soils. Usually the violator secures a contract, reclaims or has a bond forfeited, and begins to salvage soils correctly and/or corrects other problems.

**12. Current Compliance Priorities.** Agency staff have identified the following short-term priorities for the Open Cut Program:

- Increased presence on site at critical times such as soil salvage operations and during reclamation activities.
- Continued attempts to inform operators of methods and philosophy.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** None

**Partnerships.** The Open Cut Program maintains an MOU with the Forest Service; under the MOU, the Forest Service handles their own sites, but if a private operator wants to begin open cut mining on Federal land, the state program handles it.

Upon receipt of a complete Application for a Mined Land Reclamation Contract, copies of the Application are sent to the State Historic Preservation Office (SHPO), to the land owner, and to the responsible weed district. Applications are also sent to the Montana Natural Heritage Program for a file search of sensitive plant and animal species recorded in the area of interest. This input is incorporated into Environmental Assessments (EAs) and potentially into modifications to Plans of Operation and Reclamation.

The Pre-Mine Site Evaluation includes a review of potential historic and wildlife resources. Both SHPO and the Department of Fish, Wildlife & Parks are notified if the reclamation specialist notes potential significant resource values related to the proposed mine site.

**Delegated Authority.** None (other than MOU with U.S. Forest Service).

# Coal and Uranium Program

Montana's constitution makes it clear that all lands disturbed by the taking of mineral resources must be reclaimed. Both state and federal law provide for permitting, inspection and enforcement, public involvement, and selective denial of development. Coal and uranium mining regulations include provisions for permit revocation for a pattern of violations. This is the most stringent of the regulatory provisions. Furthermore, enforcement is primarily mandatory, with very little discretion whether or not enforcement is initiated.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Coal and Uranium Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. IX, Sec. 2** notes that all lands disturbed by the taking of natural resources shall be reclaimed, and the Legislature shall provide effective requirements and standards for the reclamation of lands disturbed.
- **Montana Strip and Underground Mine Reclamation Act (MSUMRA)** (MCA 82-4-201, et. seq.) provides for permitting, reclamation, and enforcement of coal and uranium mining.
- **Montana Strip and Underground Mine Siting Act** (MCA 82-4-101, et. seq.) provides for permitting, reclamation and enforcement of preparatory work for new coal mine development.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)
- **Montana Dam Safety Act** (MCA 85-15-105, et. seq.)

Related Federal authorities:

- **National Environmental Policy Act (NEPA)**

- **Surface Mine Control and Reclamation Act (SMCRA)**
- **Organic Act and National Forest Management Act** (USFS-administered lands)
- **Federal Land Planning and Management Act** (BLM-administered lands)
- others (Federal Clean Air Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act, etc.)

Coal and Uranium Administrative Rules:

- ARM 26.4.301-.327; 26.4.401-415; 26.4.501-.524; 26.4.601-.652; 26.4.701-.763; 26.4.801-.837; 26.4.901-.932; 26.4.1001-.1017; 26.4.1101-.1148; 26.4.1201-.1263; 26.4.1301-.1309; 26.4.1802-.1830

Specific enforcement authority:

- MCA 82-4-205(1), 82-4-251, and 82-4-254
- ARM 26.4.1201-1220
- SMCRA (state enforces federal law)

Primacy and Jurisdictional Agreements:

- Permanent Program Approval
- Cooperative Agreement (on federal lands)
- Applicant Violator System MOU (permit blocking for violators nationwide)
- Ceded Area MOU: regulation on off-reservation lands with tribal coal

**2. Program Goals.** Based upon the above-referenced guidance, the Coal and Uranium Program has identified the following program goals:

1. Administer and enforce the Montana Strip and Underground Mine Reclamation Act, the Montana Strip and Underground Mine Siting Act, the Montana Environmental Policy Act, and their respective administrative rules, to the extent provided by law, to allow mineral development while protecting the environment.
2. Administer and enforce a reclamation program which complies with Public Law 95-87, the Surface Mining Control and Reclamation Act of 1977.
3. Administer the law in a fair and unbiased manner.

4. Maintain and improve Montana's clean and healthful environment for present and future generations.
5. Protect environmental life-support systems from degradation.
6. Provide for the orderly development of coal resources, through strip or underground mining, to assure the wise use of the state's resources and to prevent the loss of coal resources through coal conservation.
7. Prevent undesirable land, surface and groundwater conditions detrimental to general welfare, health, safety, ecology, and property rights.
8. Prevent unreasonable degradation of Montana's natural resources.
9. Restore, enhance and preserve Montana's scenic, historic, archaeologic, scientific, cultural, and recreational sites.
10. Achieve effective reclamation of all lands disturbed by the taking of coal or uranium.
11. Maintain state administration of the coal mining regulatory program.
12. Strive to make permitting decisions in a timely manner.
13. Promote effective, efficient and economic program management.

**3. Program Activities.** In general terms, staff effort is divided between 70% permitting and 30% inspection and enforcement, but many enforcement actions involve permitting actions as well. Budgeting is not directly driven by this percentage. These activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.<sup>2</sup></u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/Site<sup>3</sup></u>	<u>Avg. # of new proj./yr<sup>2</sup></u>
Permitting	\$712,200	12.9	5.3	10 permitting 12 bond release 16 violations	NA	5
Insp./Enforcement	\$320,000	5.5	5.3	17 inspection units	NA	15 (violations)

Notes:

- 1 Includes .5 FTE administrative; 1 FTE attorney; 1 FTE Bureau Chief; .5 FTE Administrator; 1 FTE secretary.
- 2 Refers approximately to last 5 years; Also, staff retention is typically driven by market conditions for discipline-specific positions. Managers and supervisors remain in positions approximately 10 years or more; engineers 1-3 years; hydrologists and geologists 2-8 years; biologists 3-5 years, soil scientists as much as 8 years.
- 3 As of February 1996, approximately 61,000 acres of coal mines were permitted in Montana.

source: Lovelace, 1995, 1996.

**Fees and Charges.** By statute, Coal and Uranium Program revenues from fees and charges are deposited into the General Fund. The amounts of the nonvariable fees are set in statute. Civil penalties are assessed based on a point system. Additional information on fees and charges is presented in the table on the next page.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
<b>Permit Application Fees:</b>			
Prospecting Applications	\$100	\$100	General Fund
Major Revisions	\$100	\$400	General Fund
Amendments	\$50	\$100	General Fund
Renewals	\$0	\$0	NA
New Mine Applications	\$100	\$100	General Fund
<b>Additional MEPA Fees:</b>	varied	varied	EIS Preparation
<b>Noncompliance Penalties:</b>	varied	approx. \$10,000/year	General Fund
<b>TOTAL:</b>		\$10,700	

source: Lovelace, 1996.

#### **4. Regulated Communities.** The coal community is described below.

There are seven major coal development companies active in Montana; most are located in the southeastern portion of the State. Of these, one company holds six permits, other companies hold one or two permits. Sizes of active mines range from 857 acres to over 20,000 permitted acres. Surface mined coal is typically extracted via dragline or shovel, processed on site, then shipped to other locations via rail. The typical production life of a coal mine averages 20+ years.

There is currently no uranium mining in Montana; restrictions on deposition of radioactive substances in 75-3-303, MCA limit the mining methods which can be used in Montana.

Prospecting/exploration activities in Montana are generally conducted by mine companies operating in the state and typically address continued mining as an expansion of existing mines. New area prospecting, while it occurs, is limited.

**5. Philosophical Approach to Compliance.** Based on program staff interpretation of legislative history, the department philosophy is that coal mining in Montana is intended to be regulated, not prohibited. Staff feel that permit conditions and regular inspections are very effective in promoting compliance. Additionally, the blend of individuals knowing both permitting and on-the-ground provisions is highly effective in preventing noncompliance. As staff share information from mine to mine and stay current with the best technology currently available, many technical assistance opportunities occur. Staff try to head off violations through effective permit conditions, knowledge of potential problems, technical assistance, frequent site inspections, and familiarity with permit conditions. They do not hesitate, however, to issue a violation when one is discovered and cannot be corrected while the inspector is on-site.

**6. Compliance Tools Available and Used.** The Coal Program's formal inspection and enforcement procedures are documented in its *Policy and Procedures for Inspection and Enforcement*, in place since 1991, and last revised in 1995. Inspection kits have been used since the beginning of the program. These kits include field maps, mine-specific conditions lists, discipline-specific inspection procedures, and general processing procedures. Air quality inspection guidelines were formalized in a manual in 1994, which is available for the inspectors to use. The menu of tools used by the Coal and Uranium Program to achieve their natural resource/environmental mandates is shown beginning on the next page. Abbreviations used in the "Authority" column refer to the following:

Director	Agency Director (DEQ)
Div. Adm. or Adm.	Division Administrator
Bur. Chief	Bureau Chief
Attorney	Department Staff Attorney
Cty. Att.	County Attorney
Cmpl. Spc.	Compliance Specialist (Administrative, in charge of tracking system)
NA	Not Applicable
I/E Sup.	Inspection and Enforcement Supervisor
staff	program technical staff
inspectors	staff members charged with carrying out inspections

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>Education/Information/T.A.:</b> Public Access to Unavailable Lands Inventory</p> <p>On-site Technical Assistance</p> <p>Technical Seminars</p>	<p>The public may review maps of "unavailable lands" (see below) in program files. Also, "Alluvial Valley Floor" delineations are accessible through the Natural Resource Information System (NRIS) at the State Library.</p> <p>Many opportunities to provide on-site technical assistance occur during inspections, at meetings between industry and state, and at professional symposia.</p> <p>When the program contracts specialized training, industry is typically invited to attend.</p>	<p>NA</p> <p>staff</p> <p>staff</p>	<p>NA</p> <p>NA</p> <p>NA</p>
<p><b>Comp. Planning/Withdrawals:</b> Determination of Lands Unavailable for Coal Mining (3 types):</p> <ul style="list-style-type: none"> <li>- "Unsuitable" Lands</li> <li>- "SECU" Lands</li> <li>- Alluvial Valley Floors</li> </ul>	<p>(Note: In addition to the items listed below, other factors, including proximity to a public road, private dwelling, park and/or historic site can affect the mining availability of lands within permit boundaries.)</p> <p>Any citizen may petition the Department to declare lands (public and/or private) "unsuitable" for coal mining, if applicant can demonstrate a current or expected "injury" due to coal mining). Since 1980, the Department has received 1 petition which was denied; no lands have been designated as "unsuitable for mining." Prospecting is allowed on such lands, if it will not interfere with the values supporting the designation. Lands may be designated "Special, Exceptional, Critical or Unique" (SECU) if provisions of 82-4-227 MCA are met, and may be initiated via petition or Department analysis. An analysis of potential SECU lands is done for every permit application. In 1974, the Department received a petition to designate SECU lands (20 acres near Harbin). The petition was granted on the basis of the area being critical mule deer winter range. Prospecting is prohibited on SECU lands.</p> <p>"AVF" determinations are made by on a site-by-site basis, with initial information provided by the applicant and/or requested by the Department, during the permit application phase. The term refers to unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities. Since 1978, there have been 24 requests for "AVF" determinations, six of which were determined to be significant alluvial valley floors.</p>	<p>Bur. Chief</p> <p>Bur. Chief</p> <p>Bur. Chief</p>	<p>None</p> <p>None</p> <p>None</p>



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Permits/Certifications/Bonds:</b> Notice of Intent to Prospect  Prospecting Permit Mining Permit:  - Minor Revision  - Permit Amendment  - Major Revision  - Permit Renewal Opportunity for Public Comment	Required for prospecting activities that will not substantially disturb the land surface; no bond is required. Required if proposal would substantially disturb the land surface; a bond is required. Issued upon approval of Operating Plan and related contingencies. Permits must be renewed at 5-year intervals. Coal removal must commence within 3 years of permit issuance. Permits are transferable upon Department approval. (Note: permits, amendments, and major revisions require federal concurrence if federal land involved.) Required for proposed modifications to schedules, monitoring plans, operating practices, etc.; granted if the proposal is in compliance with regulations. Required to add or subtract acreage from an existing mine permit area; granted upon approval of amended Operating Plan and any related contingencies. Required for significant change to Operating Plan (with no acreage change); granted upon approval of revised Operating Plan and any related contingencies. Required every 5 years; granted if no successful objections to renewal. Public notices and opportunity for comment occur at every major phase of the permitting process, including: notice of administratively complete process along with notification to local government; notice of acceptability (technically sound application); objection opportunities and informal conference requests; MEPA compliance notices, scoping, hearings; Notice of Decision and opportunity to object, hearing opportunity. A permit will be denied if the application is incomplete, inadequate or includes unsound technology.	staff Div. Adm.  Director  Bur. Chief  Director  Director Director	2 5  None  162  1  2 <sup>1</sup> 4 <sup>4</sup>
Permit Denial  Renewal Denial  Mining Commencement Extension	If objector is successful in proving that finding necessary for permit renewal cannot be made. Also, if applicant has severe enforcement history, or has severely out-dated reclamation technologies. Since 1986, there have been three challenges, resulting in one denial. Extension of the requirement to commence mining within 3 years of permit issuance is granted if applicant proves that litigation precludes commencement or threatens significant economic loss, or other reasons beyond the control of the permittee. Since 1984, there have been four requests, three of which were granted.	NA  Director  Director  Director	NA  None  None  None

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Permits/Certifications/Bonds (cont.): Approval of Permit Transfer	<p>Transfer, sale or assignment is granted if all permit terms will be met, the transferee is not prohibited from holding a permit, if adequate bond (retroactive to beginning of permit) is posted. Since 1984, 15 transfers have been requested, of which 11 were approved, three were withdrawals and one was denied.</p> <p>Required to obtain and maintain a prospecting or mining permit; bond may be a surety, cash, or letter of credit. Bond amount calculated based upon what actual cost would be for state to reclaim disturbed land; there is no maximum bond amount.</p> <p>Required for any mine personnel conducting blasting operations; requires training, testing and experience. Certification is good for three years. As of the end of 1995, there were 50 certified blasters in Montana.</p> <p>Department review required midway (or sooner) through the 5-year permit term. Items reviewed include use of best technology currently available, success of reclamation, and effectiveness of on-the-ground practices. The review may result in permit modifications to address any deficiencies or needed upgrades.</p>		
Bond		Div. Adm.	3 <sup>2</sup>
Blaster Certification		Div. Adm.	20
Mid-Year Permit Review		Div. Adm.	34
		staff	6 <sup>1</sup>

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> Informal (news, conversations) Review of Permittee Reports: - Annual Reports - Specific Monitoring Reports  Full-Site Inspections: - Quarterly  Partial/Specific Inspections:  - Prospecting Inspections - Complaint-Generated Insp.  - Abatement Inspections - Bond-Release Inspections  Tracking of Maintenance Items On-Site Correction of Prob. (Violation Avoidance)	<p>Performed continuously on ad hoc, time-as-available, basis.</p> <p>Required to document mining progress, reclamation progress, land disturbed and plans for next year; submittal triggers review.</p> <p>Required annually or semi-annually for all disciplines, including; hydrology, wildlife, revegetation work, blasting, soil/spoil quality, pond certifications. Receipt triggers review.</p> <p>Required for active and inactive mines; inspections are to occur without notice (except for necessary meetings) on an irregular basis, and scheduled to detect violations (i.e. weekends, nights, etc.).</p> <p>Required monthly for active mines; inspections are to occur without notice (except for necessary meetings) on an irregular basis, and scheduled to detect violations (i.e. weekends, nights, etc.).</p> <p>Performed as necessary to enforce MSURMA, rules and permit; no specified frequency but linked to specific activities, such as; cultural resources, hole-plugging, etc.</p> <p>Upon receipt of signed statement alleging violations or imminent danger, and Bureau decision to conduct subsequent inspection. (Bureau must respond to complainant within 10 days as to action taken; citizen may accompany inspector to site.)</p> <p>Follow-up of violations is necessary to verify abatement of orders prior to approval of Release from Liability or Termination of Abatement.</p> <p>To inspect regrading, soil replacement, revegetation and reclamation efforts prior to approval of bond release (applies to prospecting and mining).</p> <p>Involves notation of potential problem areas while on-site and tracking efforts to address.</p> <p>If problem is corrected while inspector is on-site, resource has not been lost, and specific provision is not violated.</p>	<p>staff</p> <p>staff</p> <p>staff</p> <p>inspectors</p> <p>inspectors</p> <p>inspectors</p> <p>inspectors</p> <p>inspectors</p> <p>supervis.</p> <p>inspectors</p> <p>inspectors</p>	<p>NA</p> <p>21</p> <p>±126</p> <p>112<sup>3</sup></p> <p>111<sup>4</sup></p> <p>2</p> <p>3</p> <p>5</p> <p>±18</p> <p>NA</p> <p>173 items</p>

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Administrative Notices/Orders:</b> Notice of Non-Compliance (NON)/Order of Abatement(OA)  Operator Response to NON  Inspector Response to Operator (may include NOVPP, or): - Adjustment to OA Timeframe - Modification of NON/OA  - Opportunity for Hearing  - Order to Vacate (rescind NON) Termination of Abatement Pattern of Violations/ Show Cause Order	<p>Upon identification of violation; typically occurs in the field. Allowed abatement period is typically 30 days; abatement <u>must</u> be completed within 90 days.</p> <p>Within 15 days of receipt of NON, operator may file statement of the number of days of violation and a description of mitigating circumstances, or denial of violation.</p> <p>Required; must include whether NON will stand as written, be modified or be vacated.</p> <p>Must be requested within abatement Timeframe; basis for need must be identified.</p> <p>If necessary to correct a mistake, or to revise the required abatement due to new information.</p> <p>Must be requested by operator within 30 days of receipt of NON. Hearing results in NON being either affirmed, modified, or vacated.</p> <p>If violation issued in error, or permit condition was not clear.</p> <p>Upon documentation that abatement is complete.</p> <p>"Pattern" <u>may</u> be determined upon two violations by same operator (at same site) in 12-month period, and <u>must</u> be determined if three same or similar violations in 12-month period. Determination of pattern results in Order to Show Cause why permit should not be revoked. Order requires operator to demonstrate they can address problems, and includes opportunity for a hearing.</p>	<p>staff</p> <p>permittee inspector</p> <p>Bur.Chief</p> <p>Bur.Chief</p> <p>Adm./Att. Div. Adm. staff</p> <p>Bur. Chief</p>	<p>15</p> <p>13</p> <p>9</p> <p>2</p> <p>3</p> <p>1</p> <p>2</p> <p>12</p> <p>1</p>

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Admin. Penalties/Sanctions:</b> Notice of Violation/Proposed Penalty (NOVPP)  Penalty Waiver Opportunity for Conference/Hearing	<p>Must be issued within 30 days of operator receipt of NON; includes "points" calculation for violation and amount of proposed penalty. Penalty may be waived if no seriousness points are issued.</p> <p>Must be requested by operator 50 days after receipt of NON (Same as 20 days after NOVPP). Informal Conference results in NOVPP being either affirmed, modified, or vacated. A new conference may occur if NOVPP is modified. (Note: An informal conference is a meeting between Department and Company to exchange information on the violation. If the violation goes to a formal hearing, it is a contested case hearing. Further, if the violation includes cessation of operations, the hearing is a public hearing held in the vicinity of the mine.)</p> <p>Issued if something was incorrect, there is new information, or a need to change the penalty. (see above)</p>	Bur. Chief Div. Adm.	14 1
NOVPP Modification  - Opp. for Hearing on Mod. Findings of Fact/Conclusions of Law and Order (FFCLO)	<p>Issued within 60 days of receipt of NON, if abatement is complete, <u>and</u> no hearing is requested. Penalty must be paid within 30 days of receipt of FFCLO.</p> <p>Upon receipt of penalty payment, or issuance of Penalty Waiver.</p> <p>Upon identification of a violation involving imminent danger to public health and safety or the environment; upon failure of an operator to abate an existing violation; upon prospecting or mining activities being conducted without a permit.</p> <p>Within 30 days of receipt of CO, the operator may request an informal public hearing (a "formal" hearing must be requested within 20 days), file written statement of number of days of violation and mitigating circumstances, or deny the violation.</p> <p>The agency may vacate, modify or affirm (same as for NOVPP, above).</p>	Div. Adm.  Bur. Chief Adm./Att.	10 1 None
- Operator Response to CO	<p>Within 30 days of receipt of CO, the operator may request an informal public hearing (a "formal" hearing must be requested within 20 days), file written statement of number of days of violation and mitigating circumstances, or deny the violation.</p> <p>The agency may vacate, modify or affirm (same as for NOVPP, above).</p>	Bur. Chief I/E Sup.  staff	12 12  None
- Agency Response to Operator - Opportunity for Informal/Formal Hearing	<p>Hearing must be requested by operator within 20 days (for formal hearing) of receipt of CO. Hearing results must include whether CO will stand as written, be modified, or be vacated. As with a NOVPP, a formal hearing is a contested case hearing.</p> <p>A permit may be suspended for major infractions such as a pattern of violations; OR failure to meet a major requirement, such as not maintaining a reclamation bond in place, or not having right of access.</p>	NA Adm./Att.	None None
Permit Suspension		Div. Adm.  staff	None None

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- COAL AND URANIUM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Admin. Penalties/Sanctions: (cont'd.) Permit Revocation	Upon a demonstrated "pattern of violations" (as described above) AND permittee fails to show cause why permit should not be revoked; OR upon determination that a major permit flaw exists.		
Permit Termination (Expiration)	If coal removal has not commenced within three years of permit issuance and no extension in time period has been granted.	Director	None
Bond Forfeiture	Bonds are forfeited for performance of reclamation by the state; typically this is necessary for major violation of performance standards.	NA	None
Entry into Federal Applicant/ Violator System (national permit blocking)	Permits are blocked in this system for unresolved violations and cessation orders. Permits and their owners and controllers for which bonds have been forfeited are entered into the system.	Bur. Chief	1
Individual Civil Penalties	Can be issued to any corporate representative of permittee willfully involved in a violation, <u>if</u> a CO has been issued, <u>and</u> the CO has been unabated for 30 days.	Cmpl.Spc.	1
Civil Judicial Action: Court Adjudication	When administrative relief is exhausted and violations are unresolved.	Bur. Chief	None
Criminal Judicial Action: Misdemeanor Charges	Misdemeanor charges may be filed for willful violations, knowingly making false statements, or willfully resisting, preventing, impeding or interfering with the department in the performance of duties: fines of \$500 to \$10,000, prison terms to one year.	Attorney	12 <sup>5</sup>
		Cty. Att.	None <sup>6</sup>

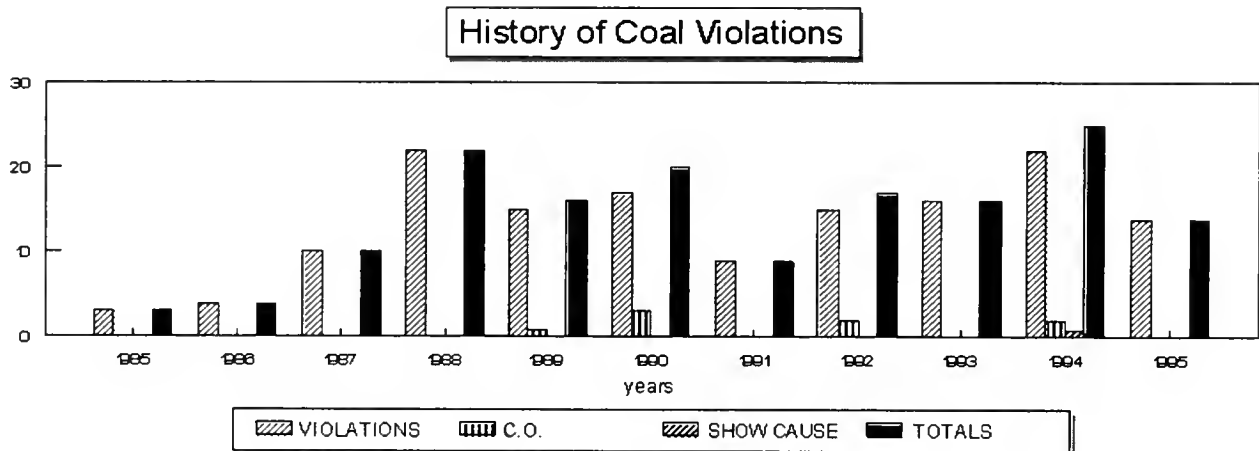
## Notes:

- <sup>1</sup> Initiated, and in progress, in 1995.
- <sup>2</sup> Three other 1005 requests for permit transfer were withdrawn.
- <sup>3</sup> This was 42 more full inspections than were required in 1995.
- <sup>4</sup> This was 1 less partial inspections than were required in 1995; however, excess complete inspections are counted as partials.
- <sup>5</sup> Eleven of these were ongoing in 1995. One was initiated in 1995.
- <sup>6</sup> Several years ago an attempt was made to prosecute a case, however, the county attorney would not proceed because the action had already been prosecuted as a civil matter. One ongoing investigation is pending at this time.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with coal and uranium rules and regulations are: 1) violation provisions which define a pattern of violations which may result in permit revocation, 2) an escalating process of violation processes (violations, cessation orders, suspensions, revocations), and 3) enforcement which occurs on-the-ground. Additionally, due to a nationwide tracking system for violators of coal mining regulations which directly blocks violators from obtaining permits if violations have not been resolved, permittees are likely to resolve violations more readily. Such permit blocks, tracked in a nationwide system, affect major corporate activities such as buying and selling mines, thus making compliance a highest priority, not a choice.

**8. History of Compliance.** Trends in compliance with Coal and Uranium Program rules and requirements are illustrated below. Over the last 10 years, violations have been issued at about a typical rate of 10 to 25 violations per year. Few Cessation Orders or Show Cause orders are issued. Cessation orders are typically issued to operations which are not operating and are not maintaining reclamation bonds. The only show cause order ever issued by the program was issued to Western Energy Company and was resolved.

**9. "Violations."** As noted in the "tools" matrix, coal and uranium operators may be out of compliance, but if the problem can be corrected in the field and no resource was lost (such as soil lost to runoff), they will not be issued a violation nor penalized. The Coal and Uranium Program defines a violation on issuance of a Notice of Noncompliance (NON). "Major or Significant" violations would be issued Cessation Orders and would meet the definition of imminent harm or other criteria described above.



As shown in the table below, the Coal and Uranium Bureau issued 16 Notices of Noncompliance (NONs) and no Cessation Orders (COs) in 1995. No NONs were issued to prospecting operations; 16 were issued to mining operators. Two of these violations were vacated. Of the NONs issued in 1995, there were two repeat violators in that time period, one with two violations, and another with seven. As shown for 1995, violations are typically of a few types: 1) actual on-the-ground violations which require equipment to perform work, 2) monitoring or reporting violations, 3) practice or method violations which require a revision to the permit to implement the practice, and 4) the violations which cannot be abated because a resource was lost or data was not collected.

**Discovery of Violations.** Over the long term, most violations in the Coal and Uranium Program are discovered through on-the-ground inspections. Many others are discovered through review of monitoring reports, both monthly and annual, as shown below.

<u>Violations Discovered, by method, 1995</u>					
<u>Group</u>	<u>Total</u>	<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
Mines	15	9	1	4	1
Prospecting	0	0	0	0	0
<b>TOTAL</b>	<b>15<sup>1</sup></b>	<b>9</b>	<b>1</b>	<b>4</b>	<b>1</b>

Notes:

<sup>1</sup>The following table shows 16 total violations in 1995, one more than listed here. The violation was a bond forfeiture and failure to reclaim violation, the program staff did not feel fit into any of the categories in this table.

source: Lovelace, 1996



1995 Coal Violations, by Type and Status

<u>Month NON Issued</u>	<u>Type of Operator</u>	<u>Description of Violation (points assessed<sup>1</sup>)</u>	<u>Penalty Assessed</u>	<u>Status at Year End</u>	<u>Significant Violation?</u>
<u>Pending in 1995<sup>2</sup>:</u>					
June '85	Operator	Unacc. Sedim. Ctr. Struct. (20 pts.)	12,400	pending	Yes
July '85	Operator	No Annual Rept/Unabated (13 pts.)	8,060	pending	Yes
July '85	Operator	No Permit to Construct (28 pts.)	24,800	pending	Yes
Aug. '86	Operator	Sediment Overflow (15 pts.)	9,300	pending	Yes
May '87	Operator	Failure to Maint. Sed. Traps (40 pts.)	62,000	pending	Yes
May '87	Operator	No Pond Cert. Reports (26 pts.)	18,600	pending	Yes
May '87	Operator	No Ann. WQ Mon. Repts. (26 pts.)	18,600	pending	Yes
June '87	Prospector	No Prospecting Permit (no pts.)	15,000	pending	Yes
June '88	Operator	No Permit to Mine (55 pts.)	127,500	pending	Yes
Aug. '90	Operator	Inadequate Sed. Control (43 pts.)	2,300	pending	Yes
Aug. '90	Operator	Inadequate Sed. Control (41 pts.)	2,100	pending	Yes
July '91	Operator	No bond, permit, or recl. (55 pts.)	127,500	pending	Yes
Sept. '91	Operator	Failure to Reclaim (55 pts.)	\$3,500	pending	Yes
July '92	Operator	Unperm. Sed. Deposit. (21 pts.)	420	pending	Yes
Sept. '92	Operator	Poor Site Security (55 pts.)	127,500	pending	Yes
July '93	Operator	Degr. of Soil/Sed. Overfl. (19 pts.)	380	pending	No
June '94	Operator	Imminent Danger (55 pts.)	127,500	pending	Yes
July '94	Operator	Failure to Abate CO (55 pts.)	127,500	pending	Yes
Oct. '94	Operator	Inadeq. Biol. Mon. (32 pts.)	1,200	pending	No
Oct. '94	Operator	Inadeq. Wildl. Mon. (29 pts.)	900	pending	No
Nov. '94	Operator	Driving on Reclamation (24 pts.)	480	pending	No
Nov. '94	Operator	Discharge Exceedence (18 pts.)	360	pending	No
Dec. '94	Operator	Spoil Ridges in Pit (20 pts.)	400	pending	No
<u>Issued in 1995:</u>					
January	Operator	Discharge Exceedence (14 points)	\$260	resolved	No
January	Operator	Inconsis. w/Blasting Plan (40 pts.)	2,000	resolved	No
February	Operator	Inconsis. w/Reveg. Plan (25 pts.)	500	resolved	No
February	Operator	Inconsis. w/Reveg. Plan (25 pts.)	500	resolved	No
February	Operator	Inconsis. w/Reveg. Plan (25 pts.)	500	resolved	No
February	Operator	Inconsis. w/Reveg. Plan (25 pts.)	500	resolved	No
March	Operator	Erosion Problems (41 points)	2,100	resolved	No
March	Operator	Grading Problems (21 points)	420	resolved	No
March	Operator	Pond Constr. Problems (21 pts.)	300	resolved	No
April	Operator	Soil Salvage Problem (19 pts.)	380	resolved	No
August	Operator	Contamin. of Coal Reserve		vacated	
October	Operator	Excess Use of Explosives (22 pts.)	440	pending	No
October	Operator	Failure to Reclaim/Permit Expiration/ Insolv. Bond (pts. undetermined)	undet.	pending	No
November	Operator	Inadeq. Aerial Wildlife Surveys (20 pts.)	400	resolved	No
November	Operator	Discharge Exceedence (13 pts.)	520	pending	No
November	Operator	Inadeq. Aerial Wildlife Surveys (19 pts.)		vacated	

Notes:

1 "Points" refers to the number of points assigned to a violation, based upon the system discussed on the next page.

2 Most of the carry-over violations were Cessation Orders issued to small coal mining operations.

source: Lovelace, 1995, 1996.

**10. Considerations in Calculating Penalties.** The Coal and Uranium Program uses a point system to assess civil penalties. Points are assigned based on seriousness, negligence, history, and good faith, as described below.

1. **Operator's History of Noncompliance (no maximum number of points):**  
One point is assessed for each **NON** (uncontested violation) or **FFCLO** (contested violation) in past year; including prospecting and mining, if carried out by same operator.
2. **Seriousness of Violation (max. = 30 points):**  
Harm to public health, safety or environment:
  1. Probability of Harm Occurring (max. = 15 points)
  2. Seriousness of Potential or Actual Harm (max. = 15 points)

**OR**

Administrative Impairment (max. = 30 points)
3. **Negligence (max. = 25 points)**
  1. Ordinary Negligence (max. = 12 points), or
  2. Gross Negligence (13 - 25 points)
4. **Good Faith (potential of 10-point maximum credit)**

The bureau's manual provides specific guidance and examples, by category, in calculating points. Penalty amounts corresponding to total points are set in rule, with a daily maximum of \$5,000 per day. A "day" is a day the action occurred that resulted in the violation (i.e. failure to submit a report is a one-time occurrence, thus is considered one day of violation, even if it takes two weeks to correct). Penalties for subsequent days that the violating activity occurs are assessed at the same rate.

**11. Resolution of Noncompliances.** As discussed above in discovery of violations, violations may require on-the-ground work, such as filling in rills and gullies, building a sediment control structure, or mending a structure which failed to work. Others may require a permitting action, typically a minor revision, to implement a new way of doing something: a new practice or using a new piece of equipment. Violations which involve monitoring practices may need to be resolved by minor revision to change a monitoring plan, or may be such that data was not collected and cannot be replaced. Some violations specifically address reclamation practices such as regrading of the surface, soil replacement or seeding. Resolution would involve abatement practices which provide the best scenario for reclamation to succeed. Violations which involve a water effluent problem would address water treatment and sediment control structures being in place and functioning.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Coal and Uranium Program.

- Assuring that offsite damages do not occur
- Assuring that contemporaneous reclamation occurs
- Assuring the health and safety of citizens as associated with concerns with blasting practices and structural integrity of sediment control features (dams and embankments)
- Assuring that coal conservation practices are implemented (all marketable and minable coal is recovered in the mining operation)
- Assuring that long-term hydrologic impacts are minimized

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** Under SMCRA (federal), if a state develops a coal regulatory program as stringent as the federal requirements, that state can be delegated authority to administer SMCRA (primacy). In 1980, Montana's program was given federal approval to enforce both state and federal coal law in Montana. This brings with it federal Office of Surface Mining (OSM) oversight and the need for state-federal coordination. OSM oversight includes an annual programmatic review of Montana's administration and enforcement of the approved state program. OSM prepares an annual report to Congress of its findings. Annual OSM findings have given Montana's coal program high marks.

In addition to this general OSM oversight, OSM inspectors occasionally accompany state inspectors to ensure accurate assessments are made of industry compliance. Inspections of coal mines involving tribal lands are conducted by both state and federal inspectors (only one Montana mine fits this scenario). Federal inspectors may issue operators a federal notice of violation after giving the state an opportunity to act. With the exception of the Absaloka Mine which has dual jurisdiction due to the tribal coal ownership, no operators in Montana have had federal violations issued to them.

**Partnerships.** Coal law allows for direct enforcement in any area, including air and water. Citations regarding air or water are issued for violations of the coal program, not the air or water laws specifically. The program maintains an air quality liaison with the Air Quality Division, which works well.

Montana's Governor has requested of the Secretary of the Interior an amendment of the Cooperative Agreement which addresses jurisdiction on federal lands. Negotiations are underway, and are expected to change the interactions of the coal program and the BLM for seeking mine plan approval, and the interactions with OSM for federal permitting and NEPA compliance. Additionally, the Crow Tribe has challenged the MOU between the OSM and Montana for regulation in the Ceded Area. This challenge is being evaluated for options and impacts.

Through membership in the Western Interstate Energy Board, the coal program coordinates with other western state coal mining regulators to keep abreast of federal legislation, litigation regarding federal coal rules, federal procedures, grants, training, and reclamation practices.

**Delegated Authority.** Aside from primacy authority, there are no specific delegations of authority to the coal program. Rather, the program provisions address other authorities such as the air and water regulation, dam safety, waste management, cultural resources and facilities.

# Hard Rock Program

Montana's constitution makes it clear that all lands disturbed by the taking of mineral resources must be reclaimed. Both state and federal law provide for permitting, inspection and enforcement, public involvement, and selective denial. The Hard Rock Mining Program is responsible for administering the Metal Mine Reclamation Act (MMRA) and the Montana Environmental Policy Act (MEPA), coordinating with other DEQ personnel to assure compliance with the Air and Water Quality Acts, and coordinating with other state and federal agencies under other applicable statutes. Hard rock mining laws apply to materials other than oil, gas, bentonite, clay, coal, sand, gravel, phosphate rock, and uranium.

**1. Constitutional and Statutory Goals.** The following provides a general guide to the constitutional, statutory, federal, and rule authorities for the activities of the Hard Rock Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. IX, Sec. 2** notes that all lands disturbed by the taking of natural resources shall be reclaimed, and the Legislature shall provide effective requirements and standards for the reclamation of lands disturbed.
- **The Metal Mine Reclamation Act** (MCA 82-4-301, et. seq.) authorizes the department to evaluate new mine sites and reclamation plans and to require that adequate information is available to properly formulate reclamation plans.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)
- **Montana Dam Safety Act** (MCA 85-15-105, et. seq.)

- **Hard Rock Impact Act** (MCA 82-4-335, et. seq.)

Related federal authorities:

- **National Environmental Policy Act (NEPA)**
- **Organic Act and National Forest Management Act** (USFS-administered lands)
- **Federal Land Planning and Management Act** (BLM-administered lands)

Hard rock administrative rules:

- ARM 26.4.101 thru .194

Specific enforcement authority:

- MCA 82-4-337, -341, -354 thru -357, and -360 thru -362
- ARM 26.4.107K-107Q

Primacy and jurisdictional agreements:

- MOU with BLM and USFS, covering interagency cooperation on hard rock mining projects
- Project-specific interagency MOUs

**2. Program Goals.** Based upon the above-referenced guidance, the Hard Rock Program has identified the following program goals:

1. Administer and enforce, to the extent provided by law, the Montana Metal Mine Reclamation Act, the Montana Environmental Policy Act and their respective administrative rules, to allow mineral development while protecting the environment.
2. Provide that the usefulness, productivity and scenic values of all land and surface waters involved in mining or exploration receive the greatest reasonable degree of protection and reclamation to beneficial use.
3. Recognize the recreational and aesthetic values of Montana as a benefit to the state.
4. Provide for mineral exploration, mining and beneficial use of lands while adequately providing for reclamation.
5. Allow for variation in reclamation specifications to account for site-specific variability.
6. Prevent undesirable land, surface water and groundwater conditions which are detrimental to general health, welfare, safety, ecology, and property rights.
7. Maintain and improve Montana's clean and healthful environment for present and future generations.

8. Recognize that complete restoration to an original condition may be precluded by some types of activities, however, minimization of impacts to the extent practical and reasonable is required.
9. Establish, on a continuing basis, vegetative cover, soil stability, water condition, and safety conditions appropriate for any proposed subsequent use of a mined area.
10. Administer and enforce a reclamation program which complies with the Metal Mine Reclamation Act.
11. Strive to make permitting decisions in a sound and timely manner.
12. Promote effective, efficient and economic program management.
13. Administer the law in a fair and unbiased manner.

**3. Program Activities.** The four major Hard Rock Program activities include: 1) management of small miners, 2) licensing of exploration activities, 3) permitting and management of large mining operations, and 4) production of Environmental Impact Statements and Environmental Assessments. These activities are described in more detail in the following table.

<u>Program Activities</u>	<u>FY 96 Budget<sup>1</sup></u>	<u>FY 96 FTEs<sup>2</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr<sup>3</sup></u>
Small Miners	136,400	2.5	5.2	750	< 5	41
Exploration	106,100	2.0	6.3	372	NA <sup>4</sup>	15
Large Mine Permitting	338,900	7.0	4.7	84	443 <sup>5</sup>	4
Env. Review	1,329,400 <sup>6</sup>	3.5	3.5	5	870 <sup>7</sup>	1

**Notes:**

- 1 Pro-rated (by FTE) from legislative allocations presented above.
- 2 Does not include 1.43 FTE administrative; 0.5 FTE attorney; and 1.0 FTE Bureau Chief.
- 3 Refers to approximately the last four years.
- 4 Compiled data is not available. Also, the range and type of site varies so greatly that "acreage" is far from meaningful. For example, an exploration site can include 10-500 drill sites, trenches and underground excavations (short to three miles long), and highly variable amounts of temporary road construction, depending on the level of existing roads.
- 5 Sizes of mining operations vary greatly; see preceding discussion, under "regulated community."
- 6 Represents half of the biennial authorization for environmental review activities; this is spending authority only, not allocated dollars.
- 7 Proposed disturbances range from 39 to 2,781 acres and vary with the size and type of deposit as well as method of recovery (surface vs. underground, etc.) The "Environmental Review" row applies to preparation of Environmental Impact Statements (EISs), not Environmental Assessments (EAs), hence the larger figure for "Average Acres per Site."

source: Olsen, 1995, 1996.

**Fees and Charges.** Hard Rock Program revenues from fees and charges are described below. The amounts of the nonvariable fees are set in statute.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
<b>Permit Application Fees:</b>			
Small Miner (SMES)	\$0	\$ 0	NA
Exploration	\$5	75	emergencies, bond shortfalls, education <sup>1</sup>
Large Mine Operation <sup>2</sup>	\$25	100	"
Annual Renewal Fees <sup>3</sup>	\$5	900	"
Annual Report Fees <sup>3</sup>	\$25	2,100	"
Noncompliance Penalties:	varied ( $\leq$ \$1,000)	26,000	"
MEPA Fees:	varied	1.3 - 1.5 million	contractor EIS/EA prep.
Excess Workload Fees	varied	< 30,000	EAs, special studies

**Notes:**

- 1 MCA 82-4-311 provides that these funds may be expended for research, reclamation, and revegetation of land and the rehabilitation of water affected by mining operations. Typically, they are used as noted in the table.
- 2 Includes fees for major amendments to operating permits.
- 3 Annual Renewal Fees apply to exploration licensees only; Annual Report Fees apply to Operations Permits only.

source: Olsen, 1995, 1996.

**4. Regulated Communities.** Consistent with the activities noted above, the Hard Rock Program interacts with three primary regulated communities: small miners, mineral exploration companies, and mineral development companies. These communities are described below.

**Small miners** are those disturbing less than 5 acres of ground and removing less than 36,500 tons of material annually. Small miners must sign a Small Miner Exclusion Statement (SMES), committing to not exceed the small mine criteria. A valid SMES exempts them from needing an Operating Permit, unless a portion of their operation involves use of cyanide. If so, they must have an operating permit for that portion. There are approximately 750 small miners, covering about the same number of small mining operations, distributed in 37 of Montana's 56 counties, primarily in the western third of the State. Most of these miners are seasonal operators. About 285 of the 750 are placer miners, three are dredge operators, and the remainder are underground miners. Of the 750, about 19 use cyanide in their operations. (See MCA 82-4-303(15) and -305 for statutory provisions specific to this community.)

**Hard rock exploration efforts** involve the search and testing of potential marketable ores. About half of all the licensees are large companies, contractors, or the development companies themselves. The remainder are medium to small companies and individuals. Exploration activities are limited to a total recovery of 10,000 tons of ore. If exploration efforts will create a "material disturbance," a state license and plan of operations are required. Mechanized exploration requires posting of a reclamation bond. "Hobby miners" (i.e. those collecting rock samples as a hobby, or when products are sold for less than a total of \$100/year) are exempt from exploration or SMES requirements. In 1995, there were 180 exploration permittees, covering 372 exploration licensees, primarily in the western half of Montana. Exploratory efforts typically last two years, and less than 1 percent of exploration efforts lead to development. (See MCA 82-4-303(7) for statutory provisions specific to this community.)

Hard rock operating permits are required for **large mine development**, which involves the extraction, processing and reprocessing of mineral ores, and reclamation of related disturbances by those who are not considered "small miners." These operations may be placer, open pit, or underground operations. In 1995, there were approximately 65 companies operating 84 active hard rock mines in Montana. Mine sizes are varied; of the 1994 permitted mines, 61% were 5-100 acres; 20% were 100-500 acres; 6% were 500-1,000 acres; and 13% were over 1,000 acres. Average operating life varies from one year to over 30 years, depending on the discovery or existence of additional reserves. Of the 159 permits ever issued (since 1971), nearly 75 have been completely reclaimed; seven of the 159 are no longer active, but reclamation is not complete. Of the currently permitted mines, about 50% have filed for major expansions since issuance of their original operating permits.

**5. Philosophical Approach to Compliance.** According to program staff, through the use of an interdisciplinary professional staff knowledgeable about mining and the site-specific conditions of the many permits, the Hard Rock Program pursues twin goals of prevention and enforcement. Permitting standards, bonding, and regular monitoring of key resources are tools used to prevent significant degradation of resources, when issuing operating permits and exploration licenses. On-the-ground protection of resources is the Bureau's primary goal. Secondly, they strive for timely completion of supporting paperwork. Inspections are conducted to ensure on-the-ground compliance, to anticipate potential problems, and to educate and provide technical input to on-going activities.

**6. Compliance Tools Available and Used.** Hard rock inspection and enforcement procedures are documented in the program's *Inspection and Enforcement Manual*, drafted in November 1995, and not yet finalized. The menu of tools used by the Hard Rock Program to achieve their natural resource/environmental mandates is shown beginning on the following pages.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with hard rock rules and regulations vary with the type of operator. It is their opinion that large

corporations do not want to receive noncompliances; the potential for a noncompliance is a greater deterrent than a penalty. Small operators, however, tend not to care about public opinion of the blemish of a noncompliance; they are much more upset about the penalty, regardless of the amount.

**8. History of Compliance.** (Note: program staff have informed the EQC that it would take several weeks of research to generate the graphs requested. They also question whether the graphs, if generated, would be very helpful. Instead, the following qualitative information has been provided.)

Trends in compliance with hard rock rules and requirements are directly related to changes in process and the numbers of inspections. Prior to 1985, the State Lands Commissioner had to sign off on all violations. As enforcement was given to a larger number of program staff, the number of enforcement actions taken has increased. This does not mean, however, that the violations are any more serious, nor does it reflect greater recalcitrance on the part of members of the regulated communities.

Approximately 125 violations have been issued since late 1989. Prior to 1989, the bureau's ability to conduct site inspections was severely hampered by the inability to adequately cover the many operations active in the State (gold was selling at \$600/ounce, meaning production and overall hard rock mining activity was high). As activity decreased and inspections became a clear staff priority, numbers of violations increased. Numbers of inspections through time is shown in Figure 3 of the bureau's Legislative Audit Report. In 1995, all required inspections were completed.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>SMALL MINERS:</b> Education/Information/T.A.: Permitting Workshop Mine Waste Seminar Informal (calls/other contacts)	Offered periodically since 1992, in partnership with USFS and BLM; open to agency personnel, small miners, exploration licensees, permittees, and the public. (see above) When time and opportunity are available.	NA NA staff	1 1 NA
<b>Comp. Planning/Withdrawals:</b> (not authorized)			
<b>Permits/Certifications/Bonds:</b> Small Miner Exemption Statement (SMES): Annual SME Renewal: - Compliance Commitment - Cert. of Bus. Relationships Operating Permit/Conditions Bond SMES Denial	Effective upon filing and initial and continued compliance with small mine criteria; areas previously reclaimed by the state are off-limits to small miners. Required annually to maintain SME status; includes commitment to not pollute streams, to install bulkheads and tunnel doors, to provide a location map, and (for placer and dredge operators) to reclaim disturbed areas. Required annually to maintain SME status; certifies that operator is not involved in any other SME operations. Required for any use of cyanide after 1989; issued upon approval of plan of operations for cyanide portion of operation (triggers requirement for annual reports -- see information for Operating Permits in subsequent portion of matrix). Required for post-1989 placer and dredge operations, and for the cyanide portion of cyanide operations; calculated for cyanide operations based on what the actual costs would be for the state to reclaim disturbed land; maximum bond for placer/dredge operations is \$5,000 per operation. (In 1995, there were 80 small miner bonds held by the Bureau.) On failure of a small miner to pay a penalty, to post bond, to reimburse the state for reclamation costs, or other failures to comply. (New authority as of 1993.)	Applicant NA Applicant Applicant Dir. staff staff	41 new ± 650 " " None 10 None



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>SMALL MINERS (cont.)</b> <b>Monitoring/Inspections:</b> Informal (news, conversations) Full-site inspections Complaint	Performed continually on an ad hoc, as time is available basis. No frequency established in statute. On receipt of signed statement alleging violations or imminent danger, and bureau decision to conduct a subsequent inspection. Bureau must respond to complainer within 30 days as to action taken.	staff staff staff	NA 204 3
<b>Administrative Notices/Orders:</b> 10-Day Notice Notice of Noncompliance (NON)/Order of Abatement (w/time frame) Small Miner Response to NON Extension of Abatement Order Time frame 30-Day/Int. to Revoke Order to Vacate NON Termination of Abatement Order to Reclaim Release from Civil Liab.	On minor failure to comply; no potential harm to public or environment, nor impairment of administration of hard rock law. Violation of conditions of SME; general failure to comply - not rapidly (<10 days) remediated; typical time frame to abate is 30 days. Alleged violator requested to respond to NON within 15 days of its receipt. Response should include days of violation and description of mitigating factors that should be considered, or denial of violation. Upon documentation of good faith effort to abate and reasonable need. For failure to comply with Orders to Abate or Reclaim; includes Notice to Foreclose Bond, where applicable. Upon documentation that NON was improperly issued. Upon documentation that NON was abated. For cyanide permits after 1989, or any small mine operation that exceeds the five-acre limit, for failure to reclaim. Upon receipt of penalty payment and completion of abatement.	staff Bur. Chief NA Bur. Chief Dir. Bur. Chief staff Dir. Bur. Chief	None 8 None None 2 None 4 None 1

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>SMALL MINERS (cont.)</b> <b>Admin. Penalties/Sanctions:</b> SME/Permit "Blocking" Notice of Proposed Penalty Opportunity for Hearing: - Informal Hearing - Formal Hearing Penalty Modification Penalty Waiver  Suspension Order  Revocation/Bond Forfeiture	<p>SME is not effective on filing for any small miner who has outstanding penalties, reclamation costs, or has not complied with an outstanding Compliance Order. Issued within 30 days of issuing NON, unless penalty waived or NON vacated. Request must be received within 30 days of receipt of Notice of Prop. Penalty. Upon request.</p> <p>Upon request. Formal hearing must be held within 20 days of request.</p> <p>Upon department determination that penalty is unjust or improperly allocated.</p> <p>Upon correction of subject of 10-Day Notice; if the penalty includes no assessment for seriousness, and a total of \$500/day or less before good faith reduction; the abatement is complete, the environmental damage is minimal, and continued operation is not proposed.</p> <p>For cyanide permits after 1989, for imminent danger or failure to pay penalties. (Note: reclamation and public and environmental protection activities must continue, unless otherwise specified.)</p> <p>Upon failure to reclaim within 6 months of cessation of operations; general failure to comply with Orders to Abate or Reclaim.</p>	<p>Director Bur. Chief</p> <p>Bur. Chief H.O./Dir. Bur. Chief</p> <p>Bur. Chief</p> <p>Director</p> <p>Director</p>	<p>None 7</p> <p>None None None</p> <p>None</p> <p>None</p> <p>2</p>
<b>Civil Judicial Action:</b>	When administrative remedies are exhausted. Used to get injunction, to resolve differences, to recover penalties, or to recover reclamation costs if necessary.	Legal	1 New
<b>EXPLORATION:</b> <b>Education/Information/T.A.:</b> Permitting Workshop Mine Waste Seminar Informal (calls/other contacts)	Offered periodically since 1992, in partnership with USFS and BLM; open to agency personnel, small miners, exploration licensees, permittees, and the public. (see above) When time and opportunity are available.	<p>NA</p> <p>NA</p> <p>staff</p>	<p>1</p> <p>1</p> <p>NA</p>
<b>Comp. Planning/Withdrawals:</b> (not authorized)			

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>EXPLORATION (cont.)</b> <b>Permits/Certifications/Bonds:</b> Expl. License/Conditions Project Changes to License Bond License Renewal License Denial	Required for mechanized, hon-hobby activities; issued upon approval of plan of operations (total licensees in 1995 = 180). May involve request for additional sites; granted, if no change in reclamation requirements. Required for all disturbances (372 projects were bonded under 180 licenses in 1995). Required annually, by statute. Upon failure of applicant to pay a penalty, to post a bond, to reimburse the state for reclamation costs, or other failures to comply.	Div. Adm. staff staff Div. Adm. Director	8 new 15 180 180 None
<b>Monitoring/Inspections:</b> Informal (news, conversations) Pre-Licensing Inspections Review of Licensee Reports: Full-Site Inspections Complaint-Generated Insp.	Performed continually on ad hoc, time-as-available basis. Upon submittal of Plan of Operations. Not required. Licensee inspections are performed prior to issuing a license and prior to releasing a bond. Upon receipt of signed statement alleging violations or imminent danger, and Bureau decision to conduct subsequent inspection. (Bureau must respond to complainer within 30 days as to action taken.)	staff staff staff staff	NA 160 96 +2

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING**

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>EXPLORATION (cont.):</b> <b>Administrative Notices/Orders:</b> 10-Day Notice  Notice of Noncompliance (NON)/Order of Abatement (with time frame) Licensee Response to NON  Order to Vacate NON Extension of Abatement Order Time Frame Termination of Abatement Order to Reclaim 30-Day NON/Intent to Revoke License and Foreclose Bond Bond Release Release From Civil Liability	<p>Upon minor failure to comply; no potential harm to public or environment, nor impairment of administration of hard rock law.</p> <p>Failure to comply; not rapidly remediated.</p> <p>Alleged violator requested to respond to NON within 15 days of receipt of NON. Response should include the number of days of violation and a description of mitigating factors that should be considered, or denial of the violation.</p> <p>Upon documentation that NON was improperly issued.</p> <p>Upon documentation of good faith effort to abate and reasonable need.</p> <p>Upon documentation that abatement is complete.</p> <p>Upon failure to reclaim and/or permit revocation.</p> <p>For failure to comply or reclaim following order.</p> <p>Upon receipt of penalty payment and completion of abatement.</p>	<p>staff</p> <p>Bur. Chief</p> <p>NA Bur. Chief</p> <p>Bur. Chief staff Director</p> <p>Director Director Bur. Chief</p>	<p>None</p> <p>2</p> <p>None None</p> <p>None unk. 1</p> <p>1 22 None</p>
<b>Admin. Penalties/Sanctions:</b> License "Blocking"  Notice of Proposed Penalty Opportunity for Hearing: - Informal Hearing - Formal Hearing  Penalty Modification Penalty Waiver Suspension Order/Order of Abatement (w/time frame)  License Revocation/Bond Forf.	<p>License cannot be issued if applicant has outstanding penalties, reclamation costs, or has not complied with an outstanding compliance order.</p> <p>Issued within 30 days of issuing NON, unless penalty waived or NON vacated.</p> <p>Request must be received within 30 days of receipt of Notice of Prop. Penalty.</p> <p>Upon request.</p> <p>Upon request. Formal hearing must be held within 20 days of request.</p> <p>Upon determination that penalty is unjust or improperly allocated.</p> <p>(See same entry for SMES, above.)</p> <p>Upon evidence of imminent harm to public health or the environment; failure to pay penalties or reimburse reclamation costs. (Note: reclamation and public and environmental protection activities must continue, unless otherwise specified.)</p> <p>Occurs if licensee has not abated, nor requested hearing within 30 days of receipt of Notice of Intent to Revoke.</p>	<p>Director Bur. Chief</p> <p>Bur. Chief H.O./Dir. Bur. Chief Bur. Chief</p> <p>Dir. Dir.</p>	<p>None 1</p> <p>None None None 1</p> <p>None 1</p>

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING**

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>EXPLORATION (cont.)</b> Civil Judicial Action:	When administrative remedies are exhausted; used to get injunctions, to resolve differences, to recover penalties, or to recover reclamation costs if necessary.	Legal	None
<b>LARGE MINE OPERATIONS:</b> Education/Information/T.A.: Permitting Workshop Mine Waste Seminar Informal (calls/other contacts) Pre-Application Consultation	Offered periodically since 1992, in partnership with USFS and BLM; open to agency personnel, small miners, exploration licensees, permittees, and the public. (see above) When time and opportunity are available. Prior to company submitting application.	NA NA NA staff	1 1 NA < 5
<b>Permits/Certifications/Bonds:</b> Operating Permits: -Special Permit Conditions -Minor Amendments -Major Amendments  Permit Denial	Required for mining, milling, and waste reprocessing; granted upon approval of operating plan and related contingencies. If necessary to provide appropriate protection. Written request from operator triggers agency analysis and conditions; request granted if compliant with statute. Written request from operator triggers agency analysis and conditions; request considered "major" if affect is significant; request granted if in compliance with statute. Permit is denied if applicant fails to pay penalties, reimburse the state for reclamation costs, or otherwise fail to comply with air, water, or reclamation standards. Two permits have been denied since initiation of the program in 1971.	Dir. staff staff  Dir.	4 new 1 41  3
		Director	None

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>LARGE MINE OPERATIONS</b> (cont.): <b>Monitoring/Inspections:</b> Informal (news, conversations) Initial Inspection Review of Permittee Reports: -Annual Reports -Quarterly Reports Full-Site Inspections: - Annual - Quarterly Complaint-Generated Insp.	<p>Performed continually on an ad hoc, time-as-available, basis. Upon receipt of application for operating permit (or for major amendment to existing permit); focus is upon potential permitting and/or MEPA issues.</p> <p>Required from Operator on annual basis, to provide project status; receipt triggers staff review. (Typically include reports on water balance, soils, incremental bonding, cultural resource mitigation, water monitoring, geologic monitoring, etc.) As required by statute and permit (include water quality monitoring results, and other data required more frequently than annually); receipt triggers staff review.</p> <p>Required for all permitted operations (total of 84; 72 do not require quarterly inspections; 12 inspected quarterly).</p> <p>Required for all active, permitted operations that (a) use cyanide, (b) have a permit requirement to monitor for potential acid rock drainage, and/or (c) exceed 1,000 acres in permit area (total = 12).</p> <p>Upon receipt of signed statement alleging violations or imminent danger, and Bureau decision to conduct subsequent inspection. (Bureau must respond to complainer within 30 days as to action taken.)</p>	staff staff staff staff staff staff staff	NA 4 84 46 72 48 1

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>LARGE MINE OPERATIONS</b> (cont.) <b>Administrative Notices/Orders:</b> 10-Day Notice Notice of Noncompl./Order of Abatement (w/time frame) Operator Response to NON Order to Vacate NON Extension of Abatement Order Time Frame Termination of Abatement Order to Reclaim Bond Release 30-day Intent to Revoke Release from Civil Liability	Upon minor failure to comply Failure to comply; not rapidly (<10 days) remediated; typical time frame to abate is 30 days from receipt of NON. Alleged violator requested to respond to NON within 15 days of receipt; response should include number of days of violation and description of mitigating factors that should be considered, or denial of the violation. Upon documentation that NON was improperly issued. Upon documentation of good faith effort to abate and reasonable need. Upon documentation that abatement is complete. For failure to reclaim of document temporary cessation. For failure to comply with Orders to Abate or Reclaim; includes Notice to Foreclose Bond, where applicable. Upon receipt of penalty payment and completion of abatement.	staff Bur. Chief NA Bur. Chief Bur. Chief staff Director Director Director unk.	None 4 2 2 1 unk. unk. 4 None 15

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HARD ROCK MINING

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>LARGE MINE OPERATIONS</b> (cont.): <b>Admin. Penalties/Sanctions:</b> Block New Montana Permits  Notice of Proposed Penalty  Opportunity for Hearing: - Informal Hearing - Formal Hearing Penalty Modification Penalty Waiver  Suspension Order/Order of Abatement (w/time frame)	<p>Permit blocked if person involved in proposed operation was a principal, or had controlling interest, in an operation involved in a bond forfeiture, and costs to department, penalties, and interest have not been paid.</p> <p>Typically issued within 30 days of issuance of NON. Penalty amount is considered to be a "settlement" offer, due within 30 days of receipt of Notice.</p> <p>Must be requested by Operator within 30 days of receipt of NON.</p> <p>Upon request.</p> <p>Upon request. Formal hearing must be held within 20 days of request.</p> <p>Upon department determination that penalty is unjust or improperly allocated.</p> <p>Upon correction of subject of 10-Day Notice; if the penalty includes no assessment for seriousness, and a total of \$500/day or less before good faith reduction; if the abatement is complete, environmental damage is minimal, and continued operation is not proposed.</p> <p>Evidence of imminent harm to public health or the environment; failure to pay penalties or reimburse reclamation costs; failure to submit annual report. (Note: reclamation and public/environmental protection activities must continue, unless otherwise specified.)</p> <p>For failure to comply with NON or Order to Reclaim.</p>	<p>Director</p> <p>Bur. Chief</p> <p>Bur. Chief</p> <p>H.O/Board</p> <p>Bur. Chief</p> <p>Bur. Chief</p> <p>staff</p> <p>Director</p> <p>Legal</p>	<p>None</p> <p>3</p> <p>1</p> <p>None</p> <p>None</p> <p>2</p> <p>4</p> <p>None</p> <p>1</p>
<b>Permit Revocation/Bond Forfeit</b>  <b>Civil Judicial Action:</b>	<p>When administrative remedies are exhausted; used to get injunctions, to resolve differences, to recover penalties, or to recover reclamation costs if necessary.</p>		



**9. "Violations."** As noted in the "tools" matrix, MMRA permittees may be out of compliance, issued a 10-Day Notice, correct the problem, and be eligible for a penalty waiver. The MMRA prohibits violation of terms of the Act, rules, and permit provisions; when an inconsistency exists, a "violation" exists. When criteria are not met, a NON is issued. "Significant" violations are defined as violations which create imminent danger to the health or safety of the public or cause significant environmental harm. Since significance criteria have only existed since October 1995, there is no information regarding trends in significant violations.

During the 1995 calendar year, the Hard Rock Bureau issued 14 NONs: eight were issued to small miners, two were issued to exploration licensees, and four were issued to operation permittees. There was one repeat violator in that time period, a small miner, who was issued three NONs in a four-month period, two of which were considered potentially significant. The CY 95 list of hard rock noncompliances is shown below. During 1995, an additional 12 NONs from prior years were released from civil liability because penalties were paid and/or abatement was completed at the end of 1994 or the beginning of 1995.

**1995 Hard Rock NONs, by Type and Status**

<b><u>Month NON Issued</u></b>	<b><u>Type of Operator</u></b>	<b><u>Desc. of Violation</u></b>	<b><u>Penalty Assessed</u></b>	<b><u>Status at Year End</u></b>	<b><u>Significant Violation?</u></b>
January	Operating Permit	Reclamation Needed	waived	vacated	No
January	Exploration	Reclamation Needed	unk.	bond forf.	No
March	Exploration	Reclamation Needed	waived	subdivided	No
May	SMES	Sediment Discharge	\$500	settled	No
May	Operating Permit	Road Construction Plan Needed	waived	fully resolved <sup>1</sup>	No
June	CN-SMES	Overtopped Cyanide Ponds +	\$8,000	abated/unpaid <sup>2</sup>	Yes <sup>3</sup>
June	SMES	Excess Disturbance	1,000	fully resolved	No
June	SMES	Failure to Replace Bond +	1,000	unab./unpd. +	No
September	Operating Permit	Failure to Reclaim	100	fully resolved	No
September	SMES	Reclamation Needed +	1,000	unabat./unpd. <sup>2</sup>	No
October	Operating Permit	Failure to reclaim	unk.	fully resolved	No
October	SMES	Exploration w/o License	600	Pending <sup>4</sup>	No
October	Exploration	Sediment Discharge	15,900 <sup>5</sup>	Hearing Pend.	Yes <sup>3</sup>
October	CN-SMES	Cyanide Release +	10,000	abated/unpd. <sup>2</sup>	Yes <sup>3</sup>

**Notes:**

- 1 "Fully resolved" refers to an NON being completely processed; the abatement is complete, the penalty (if not waived) is paid, and the violator has been released from further civil liability.
- 2 Referred to legal staff.
- 3 As of 10/95, MMRA defines significant as creation of an imminent danger to the health or safety of the public or causes significant environmental harm. This violation created some biological impairment, but no fish kills.
- 4 Abatement is still being sorted out, as ownership is being sorted out.
- 5 According to program staff, this operator is in transition in terms of ownership, as well as goals (having applied for an operating permit without the necessary level of expertise available onsite). The miner is working with the Department to come into compliance, but is not finding it easy. The miner has requested a hearing on the penalty. The hearing will be delayed until abatement is complete.

source: Olsen, 1995, 1996.

**Discovery of Violations.** Most violations in the Hard Rock Program are discovered through inspections, as shown on the following page.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
Small Miners	7	0	0 <sup>1</sup>	7	0
Exploration	3	0	0	2	0
Large Mine Operations	4	0	0	4	0

Notes:

- 1 This NON was issued as a two-part penalty. The operator self-reported additional releases of sediment-laden water, which added to the total days the violator was assessed a penalty.

source: Olsen, 1995, 1996.

**10. Considerations in Calculating Penalties.** The Hard Rock Program uses a violation determination system similar to the Coal Program, with different economic ceilings for penalties. Under most circumstances, the total proposed penalty can not be less than \$100 per day, nor exceed \$1,000 per day. If the violation creates imminent public harm or significant environmental effect, the maximum daily penalty is \$5,000. Penalty amounts are calculated as follows:

**Violator's History of Noncompliance:**

\$50/each NON in last 3 years

\$250/Suspension Order in last 3 years

(Note: Only NONs/SOs that have been resolved are counted; "resolved" means that the penalty has been paid, abatement completed, and civil liability released.)

**Seriousness of Violation, based on:**

(1) harm to public health, public safety or environment (\$5,000/day maximum); and/or

(2) violation of an administrative requirement (e.g. submitting a report) that impairs administration (maximum fine = \$1,000/day); and/or

**Negligence:**

(1) Accidental = \$0

(2) Ordinary Negligence = \$200

(3) Intentional Negligence (acting with disregard, but no intent to violate) = \$400

(4) Aggravated Negligence (intent to violate) = \$500

**Good Faith:** Deductions of up to \$200/day can be made for extraordinary measures taken to achieve compliance in set time frames. \$50 can be deducted if the violation is self-reported.

**Number of Days:** The per-day penalty (calculated via the above considerations) is multiplied by the number of days the violation was occurring. For a one-time incident (e.g. disturbance across the permit boundary), one day would be assessed, whereas multiple days are assessed for ongoing occurrences (e.g. continuing to discharge waters not in compliance with standards).

Additional information on penalty calculations for the Hard Rock Program is provided in ARM 26.4.107O.

**11. Resolution of Noncompliances.** (Note: program staff have informed the EQC that information on the resolution of compliances over time is in the files, but would take a considerable amount of time to compile into the suggested bar graphs. They note that an electronic tracking system was not initiated until a few years ago. They also note that numbers are most likely affected by the total number of operations permitted, and that differences shown (based upon anything but statutory changes) were not

significant. Instead, the following qualitative information has been provided.)

Most noncompliances in the Hard Rock Program are resolved through administrative processes. No trends exist based upon time alone. Since late 1989, seven NONs have been referred to legal staff for additional action. (This number does not include a situation in 1993, where numerous violations, tied to one operator, were referred to legal staff because collection was complicated by the operator filing for bankruptcy.) In 1995, three violations were referred to legal staff. As a result of legislative changes in 1995, any judicially-resolved noncompliances will be more cost-effective for the department. (Prior to 1995, all penalties were settlement offers; thus the full range of the noncompliance was open to judicial review.)

**12. Current Compliance Priorities.** Agency staff have identified the following short-term, co-equal, inspection and enforcement priorities for the Hard Rock Program:

- promoting regulatee understanding of permit/license/SMES requirements
- completing required inspections
- processing required enforcement actions
- providing technical and program information to operators/licensees/small miners to facilitate compliance with the MMRA.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** There is no federal oversight of the implementation of hard rock mining laws in Montana. There is federal oversight, however, of Montana's air and water programs, with which the mining program coordinates.

**Partnerships.** As noted in the tools matrix, the Hard Rock Bureau partners with the U.S. Forest Service and U.S. Bureau of Land Management in holding training sessions. These have been well-attended. Also, Memoranda of Understanding (MOUs) provide for the sharing of permit reviews, permit maintenance, and inspections reports. These relationships are working well.

The Metal Mine Reclamation Act allows for direct enforcement in water and air when specific water and air permit provisions in a plan of operations have been violated. The Hard Rock Bureau has some "delegated" authority from the Water Quality Division, in that the Water Quality Act provides exemptions from duplicative permitting of some activities under that Act. In addition, violations are issued by DEQ's Water Quality Division when performance standards of the Water Quality Act have been violated. The issue of double jeopardy has been raised.

Prior to issuing an operating permit, the Hard Rock Bureau must get certification from the Department of Commerce that an applicant is in compliance with the Hard Rock Impact Act.

The Bureau routinely provides copies of operating permit inspection reports to other DEQ programs and appropriate state/federal land managing agencies.

**Delegated Authority.** There are no MMRA authorities that have been delegated to entities other than the Hard Rock Bureau.

## WASTE MANAGEMENT DIVISION

The Waste Management Division is one of 6 currently organized within the Department of Environmental Quality. The division represents an organizational grouping of four separate but closely related environmental protection programs. Each of the four programs is designed to protect public health and the environment. They include: 1) Solid Waste Management, which provides for the licensing, technical assistance, inspection and enforcement of municipal, County, and private solid waste management systems throughout the state; 2) Motor Vehicle Recycling and Disposal, a regulatory program that controls the removal and disposal of junk motor vehicles and shielding of vehicle disposal sites; 3) Hazardous Waste, a regulatory program that controls the generation, transportation, treatment, storage, and disposal of hazardous wastes; and 4) the Underground Storage Tank (UST) Release Prevention program, a regulatory program designed to prevent releases from underground tanks. Refer also to the Environmental Remediation Division for further information regarding corrective action efforts.

The programs operate under the authorities and directives of one or more state laws. With the exception of the Motor Vehicle Recycling and Disposal Program, each of the programs is Montana's counterpart response to a federal environmental program established under the authority of the Resource Conservation and Recovery Act of 1976, as amended (RCRA). The Motor Vehicle Recycling Program is purely a state initiative, established by the 1973 Legislature, and has no direct national counterpart.

Each of the programs functions to control the handling and ultimate disposal of waste materials, except the Underground Storage Tank Release Prevention Program, which functions to minimize the occurrence of releases from tank systems that store petroleum products or hazardous substances.

All four of the Division's programs have been identified as being subject to review under the criteria established by the EQC Subcommittee for the Compliance and Enforcement Study. The FY 96 budget, staffing and funding source information for the Waste Management Division is provided below.

<u>Funding Source, FY 96</u>						
<u>Program/Activity</u>	<u>General Fund</u>	<u>State Special</u>	<u>Fees</u>	<u>Federal</u>	<u>Total Funds</u>	<u>FTE auth.</u>
Motor Vehicle Recyc	0	1,073,688	0	0	1,073,688	3.71
Solid Waste	151,997	0	626,851	0	778,848	15.07
UST Release Prevntn	0	47,158	604,241	141,474	792,873	11.86
Hazardous Waste	0	520,602	12,792	390,692	924,086	16.20
<b>TOTAL (FY 96)</b>	<b>151,997</b>	<b>1,641,448</b>	<b>1,243,884</b>	<b>532,166</b>	<b>3,569,495</b>	<b>46.84</b>
<b>TOTAL (FY 90)<sup>1</sup></b>	<b>195,354</b>	<b>1,483,839<sup>2</sup></b>		<b>557,428</b>	<b>2,236,621</b>	<b>23.50</b>

**Notes:**

<sup>1</sup> The Waste Management Division did not exist in FY 90; information extracted from 1989 LFA report; Dept. of Health and Environmental Sciences, Solid and Hazardous Waste Bureau figures excluding Superfund, LUST, and CECRA figures (see also Environmental Remediation Division).

<sup>2</sup> 1990 figure includes fees

sources: Thorvilson and DEQ Central Services Div. 1996, LFA 1989 for FY 90.

## Legislative History:

Events important to the compliance/enforcement elements of the Waste Management Division are summarized below.

- 1965 Solid Waste Management Program initiated
- 1973 Motor Vehicle Recycling and Disposal Act
- 1976 Congress passes the Federal Resource Conservation and Recovery Act (RCRA) establishing federal requirements for managing solid and hazardous wastes in the U.S.
- 1977 Hazardous Waste Program authority added to Mont. Solid Waste Mgmt Act
- 1981 Montana Hazardous Waste Management Program receives federal "Interim Authorization"
- 1981 Montana Hazardous Waste Management Act recodified
- 1984 Montana Hazardous Waste Management Program receives federal Authorization
- 1984 Congress passes Federal RCRA Subtitle I; initiates federal\state Underground Storage Tank programs
- 1985 Mont. Haz Waste Act amended to authorize initial state UST program efforts
- 1989 Mont. Haz Waste and Underground Storage Tank Act
- 1989 Mont. Petroleum Tank Release and Compensation Act
- 1989 Mont. Underground Storage Tank Installer, Licensing and Permitting Act
- 1991 Montana Infectious Waste Management Act
- 1991 Montana Megalndfill Siting Act
- 1991 Montana Integrated Waste Management Act
- 1993 Federal RCRA Subtitle D Solid Waste Rules effective
- 1993 Montana Solid Waste Management Program receives federal Approval
- 1996 Montana Underground Storage Tank Program receives federal Authorization

# Solid Waste Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Solid Waste Program.

Primary constitutional and statutory authorities (see Appendix B):

- Article II, section 3 - "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment" . . .
- **75-10-202. Legislative findings and policy.** The health and welfare of Montana citizens are being endangered by improperly operated solid waste management systems and by the improper and unregulated disposal of wastes. It is the public policy of this state to control solid waste management systems to protect the public health and safety and to conserve natural resources.
- **75-10-902. Purpose - Megalandfills.** It is the constitutionally declared policy of this state to maintain and improve a clean and healthful environment for present and future generations, to protect the environment from degradation and prevent unreasonable depletion and degradation of natural resources, and to provide for administration and enforcement to attain these objectives.
- **75-10-1002. Purpose - Infectious Waste.** The purpose of this part is to protect the public health, safety, and welfare of the citizens of Montana by developing and implementing infectious waste management policies that are reasonable, cost-effective, aesthetically pleasing, and environmentally acceptable.
- **75-10-101. Purpose - Solid Waste.** Encourages good management of solid waste and the conservation of natural resources through the promotion or development of systems to collect, separate, reclaim, recycle, and dispose of solid waste for energy production purposes where economically feasible and to provide a coordinated state solid waste and resource recovery plan.

- **75-10-804. Integrated waste management priorities.** State purpose to plan for and implement an integrated approach to solid waste management on the following order of priority:
  - (1) reduction of waste generated at the source;
  - (2) reuse of waste;
  - (3) recycling of waste;
  - (4) composting of biodegradable waste; and(5) landfill disposal or incineration.

Supplemental and/or related state authorities:

- 75-1-201, Montana Environmental Policy Act
- 75-2-210, Clean Air Act
- 75-5-301, Water Quality Act
- 75-10-401, Hazardous Waste and Underground Storage Tank Act
- 75-10-701, State CECRA Act

Related federal authorities:

- 42 U.S.C. § 6901 et seq. Resource Conservation and Recovery Act

Specific enforcement authority:

- 75-10-224, License revocation
- 75-10-227, Administrative enforcement,
- 75-10-228, Civil penalties
- 75-10-231, Criminal penalties
- 75-10-939, License revocation
- 75-10-943, Civil injunctions and penalties
- ARM 17.50.526, Enforcement

Primacy and jurisdictional agreements:

- EPA approval to enforce RCRA Subtitle D regulations.

**2. Program Goals.** Based upon the above-referenced guidance, the Solid Waste Program has identified the following program goals:

1. Ensure that all proposed solid waste management systems are designed and constructed in compliance with all applicable state laws and rules. Review solid waste management system license applications for compliance and issue/deny licenses as appropriate to approximately 20 new solid waste management systems per year.
2. Ensure that all solid waste management systems are operated and maintained in compliance with all state laws and rules.  
Conduct detailed compliance inspections and monitoring reviews at all licensed solid waste management systems.
3. Ensure that program funding mechanisms are maintained and complied with to provide the program with sufficient funds for operation. Assess and collect annual solid waste management system license fees and license application fees from all systems or systems applying for a license.

4. Ensure that solid waste management systems are planned, designed, and constructed in a manner compatible with the Montana Integrated Solid Waste Management Plan. Provide technical assistance and advice to owners and operators on licensing, operational, and waste reduction/reuse/recycling issues.
5. Ensure that all solid waste disposal activities protect the human and physical environment as required by state laws and rules.
- Investigate complaints and/or reports of illegal or noncomplying disposal activities and pursue legal enforcement where necessary.
6. Ensure that system owners, operators and the public have access to reliable information on solid waste disposal issues.  
Serve as a clearinghouse for information on waste reduction/reuse, recycling technology, composting and household hazardous wastes.

**3. Program Activities.** The Solid Waste Program's activity revolves around the regulation of solid waste management facilities. These activities include conducting on-site inspections at solid waste management facilities; reviewing construction and operational plans for new or upgraded facilities; preparation of Environmental Assessments for new facility licensing; conducting on-site investigation of complaints; reviewing facility files and environmental monitoring data; consulting with facility owners and operators on matters of compliance; compiling evidence and documents for enforcement cases; preparing and conducting operator training opportunities; consulting with cities, counties, owners, operators, and other interested groups on the issue of integrated waste management activities; and responding to inquiries and requests for information from the regulated community and the general public.

There are 119 licensed sites in Montana including:

Burn sites:	9	Municipal Solid Waste Incinerators:	1
Compost sites:	2	Class III Resource Recovery Facilities:	3
Infectious waste treatment facilities:	1	Septage Disposal Facilities:	1
Class II landfills:		Soil Treatment Facilities:	4
(municipal solid waste landfills)	42	Class II Transfer Stations:	9
Class III Landfills:			
(inert materials)	47		

These activities are described in more detail below.

<b>Program Activities</b>	<b>FY 96 Budget</b>	<b>FY 96 FTEs<sup>1</sup></b>	<b>Avg. Years Staff Retntn.</b>	<b>1995 Ongoing Projects/Sites</b>	<b>Avg. Tons/ Site</b>	<b>Avg. # of new proj./yr</b>
<b>Licensing/upgrades</b>	<b>\$172,351</b>	<b>3.5</b>	<b>2.07 yrs</b>	<b>NA</b>	<b>26,676</b>	<b>17/28<sup>2</sup></b>
<b>Regulatory Inspection and Complaint</b>						
<b>Enforcement</b>	<b>\$277,240</b>	<b>5.63</b>	<b>2.14 yrs</b>	<b>27<sup>3</sup></b>	<b>NA</b>	<b>132/72/1<sup>4</sup></b>
<b>Recycling</b>	<b>\$49,243</b>	<b>1.0</b>	<b>2.25 yrs</b>			
<b>Program Support</b>	<b>\$156,102</b>	<b>3.17</b>	<b>2.6 yrs</b>			
<b>Administration</b>	<b>\$87,161</b>	<b>1.77</b>	<b>2.0 yrs</b>			
<b>Operator Training</b>	<b>\$46,750</b>	<b>N/A</b>	<b>N/A</b>			
<b>Total</b>	<b>\$788,847</b>	<b>15.07</b>				

Notes:

1. Above figures include 1.77 FTE administrative; .96 FTE attorney; and 3.17 FTE Program Support.
2. Licenses/Closures
3. Unresolved complaints
4. Inspections/Complaints/Formal Enforcement

source: Dilliard, 1996.

## Fees and Charges

The Solid Waste Program receives 80.5% of its operating budget from the state special revenue fund. This fund consists of license renewal fees, license application review fees, and megalandfill certificate of site acceptability and penalty fees.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses<sup>1</sup></u>
<b>License Application Fees:</b>			
Major Class II Landfill	\$10,000	\$10,000	
Intermediate Class II Landfill	7,500	3,750	
Minor Class II Landfill	5,000	0	
Major Class III Landfill	3,000	0	
Minor Class III Landfill	2,000	6,000	
Major Incinerator	10,000	8,000	
Intermediate Incinerator	7,500	0	
Minor Incinerator	5,000	0	
Major Soil Treatment Facility	1,000	0	
Intermediate Soil Treatment Facility	3,000	6,000	
Minor Soil Treatment Facility	2,000	2,000	
Transfer Station (> 10,000 tons/yr)	3,000	0	
Transfer Station (< 10,000 tons/yr)	1,000	0	
Larger Composter Operation	5,000	0	
Megalandfill Fees	40,000 <sup>2</sup>	0	

### Notes:

1. All fees, fines, and penalties collected under the Solid Waste Management Act and the Megalandfill Siting Act, except for those collected by a justice's court under the Megalandfill Act, must be deposited in the solid waste management account provided in 75-10-117, MCA for use by the department in carrying out its functions and responsibilities related to solid waste management.
2. Plus an additional fee of \$.20 per ton above 200,000 tons.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses<sup>1</sup></u>
<b>Annual License Fees:</b>			
Major Class II Landfill	\$3,500 <sup>2</sup>	\$214,584	
Intermediate Class II Landfill	3,000 <sup>2</sup>	105,318	
Minor Class II Landfill	2,500 <sup>2</sup>	54,121	
Major Class III Landfill	1,000	3,000	
Minor Class III Landfill	500	25,265	
Major Incinerator	3,500 <sup>2</sup>	0	
Intermediate Incinerator	3,500 <sup>2</sup>	7,179	
Minor Incinerator	2,500 <sup>2</sup>	0	
Major Soil Treatment Facility	1,500	2,250	
Intermediate Soil Treatment Facility	1,000	0	
Minor Soil Treatment Facility	500	500	
Transfer Station (> 10,000 tons/yr)	1,050	2,100	
Transfer Station (< 10,000 tons/yr)	400	2,207	
Larger Composter Operation	1,500	3,000	
Infectious Medical Waste Processor	2,500	2,503	
Imported Solid Waste Fees	0 <sup>3</sup>	11,071	

### Notes:

1. All fees, fines, and penalties collected under the Solid Waste Management Act and the Megalandfill Siting Act, except for those collected by a justice's court under the Megalandfill Act, must be deposited in the solid waste management account provided in 75-10-117, MCA for use by the department in carrying out its functions and responsibilities related to solid waste management.
2. Plus an additional disposal fee of \$.31 per ton.
3. Plus an additional disposal fee of \$.27 per ton.



<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses<sup>1</sup></u>
<b>License Transfer Fees<sup>2</sup>:</b>			
Major Class II Landfill	\$500	0	
Intermediate Class II Landfill	400	0	
Minor Class II Landfill	300	0	
Major Class III Landfill	200	0	
Minor Class III Landfill	150	0	
Major Incinerator	500	0	
Intermediate Incinerator	400	0	
Minor Incinerator	300	0	
Transfer Station (> 10,000 tons/yr)	100	0	
Transfer Station (< 10,000 tons/yr)	250	0	
Larger Composter Operation	400	0	

**Notes:**

1. All fees, fines, and penalties collected under the Solid Waste Management Act and the Megalandfill Siting Act, except for those collected by a justice's court under the Megalandfill Act, must be deposited in the solid waste management account provided in 75-10-117, MCA for use by the department in carrying out its functions and responsibilities related to solid waste management.
2. License transfer fees apply only to those facilities where there is a change in ownership. This does not frequently occur, averaging less than 1 transfer per year.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses<sup>1</sup></u>
<b>Noncompliance Penalties:</b>			
Administrative Penalty	Not Authorized		
Civil Penalty	\$1,000/day	\$7,500	
Civil Penalty - Megalandfill	25,000/day	0	
Criminal Penalty	50-500/day	0	
Dumping	Up to \$100	0	
Absolute Liability	Up to \$5,000	0	

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Uses</u>
<b>Additional MEPA Fees:</b>	Not authorized		

**4. Regulated Communities.** In general any person operating a solid waste management system, constructing a megalandfill, or improperly disposing of a solid waste is a member of the regulated community. The program uses the licensing process as well as investigations and inspections to identify the actual regulated community. 66% of the 119 licensed site are local governments and 34% are private business or individuals.

**5. Philosophical Approach to Compliance.** The program believes that when a violation is noted, reasonable informal enforcement efforts to obtain voluntary compliance should be used prior to resorting to formal enforcement actions.

The program will pursue all available options to promote compliance. Including:

- licensing reviews to ensure that proposed facilities are designed and planned to comply with the requirements;
- periodic routine inspections to ensure that facilities are constructed, operated, and maintained in compliance;
- investigation of complaints to determine compliance status;
- individual and on-site consultations with operators on specific compliance problems and options for

- correction;
- continuing owner/operator educational and training opportunities to help them understand the requirements and how to comply with them; and when necessary, formal enforcement actions.

**6. Compliance Tools Available and Used.** The menu of tools used by the Solid Waste Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with DEQ's rules and regulations are as follows.

**Agency-Generated:**

- Compliance with the rules and regulations does not provide the agency with an incentive or reason to pursue enforcement actions.
- A history of good compliance would allow the agency to use its enforcement discretion when a violation does occur and delay or downgrade the enforcement action.

**Industry-Generated:**

- Large multinational waste management companies offer awards and other recognition for facilities with exceptional performance records.

**Client-Generated:**

- Local Governments, Solid Waste Districts, and major industries and businesses may use compliance in the selection of solid waste management facilities to be used. Lack of compliance may result in the loss of business.
- Federal regulations allow for citizen filed lawsuits against any waste management facility that they believe is not complying with the requirements of federal regulations. A losing facility may be responsible for large monetary judgements and defense costs.
- Public and/or neighbor demand for adequate protection from potential impacts of improper waste management may inspire compliance.

**Other:**

- Noncompliance can result in legal and financial liability for damage caused by an environmental release from the facility as well as the responsibility for the cleanup costs.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SOLID WASTE

Tools Authorized	"Trigger" (When Used?) <sup>1</sup>	Authority to Complete	Times Used? (95)
<b>Education/Information/T.A.:</b> * Routine Activities  * Formal Education Activities  * Written Material	<p>Information and technical assistance are provided to solid waste management facility owners and operators whenever a violation is discovered. This information and assistance is offered in the field at the time of the inspection/discovery and further information is provided in the official inspection report or letter that follows.</p> <p>In addition the program sponsored and participated in formal educational/training seminars for solid waste management facility owners and operators.</p> <p>Also the program publishes and distributes a quarterly newsletter for solid waste management official, environmental health officials, and local government officials, and other interested parties that discusses various topics of interest and relays information and advice to the readers.</p>	<p>Staff</p> <p>Staff</p> <p>Staff</p>	<p>145 Approx</p> <p>6</p> <p>4</p>
<b>Comp Planning/Withdrawals:</b> * State Solid Waste Management Plan	<p>Section 75-10-807 requires the DEQ to prepare and implement an integrated waste management program ensuring adequate disposal capacity.</p>	<p>Board of Environmental Review (BER)</p>	<p>Annual Plan Review</p>
<b>Permits/Certifications/Bonds:</b> * Facility License  * Certificates of Site Acceptability	<p>A license from the department is required prior to the operation of a solid waste management facility. The licensing process is triggered by the submittal of an application from the proposed facility and is reviewed by the program for compliance with the regulations. A solid waste management facility license issued by the department is not valid until signed by the local health officer. Licenses are permanent but must be renewed annually.</p> <p>Certificates of site acceptability are required prior to the construction and operation of a megalandfill. The certification process is triggered by the submittal of a long-range plan 2 years in advance of submitting a license application to the department. The certification and licensing reviews run concurrently.</p>	<p>Division Administrator</p> <p>BER</p>	<p>110</p>

## Notes:

<sup>1</sup> The actual "trigger" of any particular enforcement tool may vary for each effort depending on the particulars of the situation. For instance; a facility that has a good compliance history and has demonstrated a willingness to cooperate with the department may be started at a lower level of enforcement action than a facility with a bad compliance history and past uncooperativeness.

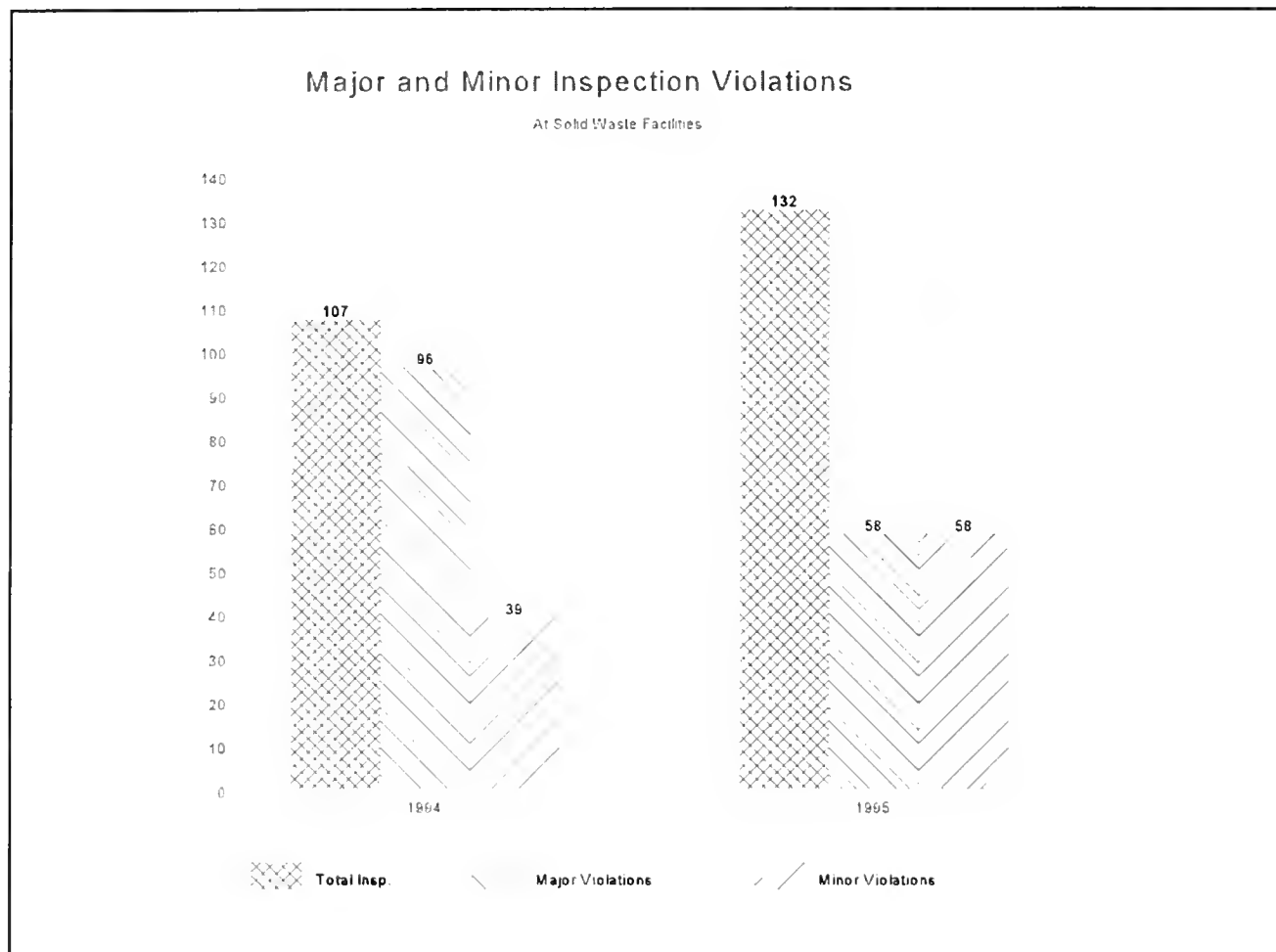
# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SOLID WASTE

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Permits/Certifications/Bonds</b> Cont: * Financial Assurance/Bonds	Financial Assurance/Bonds are required for closure activity, post closure monitoring, and any corrective actions at all Class II landfills and megalandfills. The financial assurance/bond may be forfeited if the facility does not meet the closure, post-closure, or corrective action requirements.	DEQ Director (or BER for Megalandfill Is)	0
<b>Monitoring/Inspections:</b> * On-site routine inspections	On-site routine inspections are conducted at licensed solid waste management facilities annually. Follow-up inspections are performed as needed to verify compliance activity deadlines and/or continued compliance or noncompliance after an initial inspection.	Staff	132
* Monitoring	Monitoring of groundwater and methane gas is required at licensed Class II landfills. Groundwater must be tested semiannually and methane gas generation monitored on a quarterly basis. The monitoring is conducted by the facility operator and the results are submitted to the program and reviewed by the program staff.	Staff	80 Ground Water 148 Methane
* Complaint Investigation	Investigation of complaints is triggered by the receipt of the complaint by the program. All complaints are investigated at the earliest possible convenience and when necessary referred to the appropriate program, division, or agency if not a solid waste violation.	Staff	57
<b>Administrative Notices/Orders:</b> * Warning Letters	Warning letters are used in situations where the violator is an unlicensed facility or individual and an inspection report is inappropriate. They are also used to confirm the noncompliance and the department commitment to pursue further enforcement in situations where licensed facility operators may be becoming reluctant to proceed with efforts to obtain compliance.	Program Manager	22
* Administrative Orders	Administrative Orders are a formal enforcement activity that can be used for any magnitude of violation (low to emergency). Triggers for an administrative order range from repetitious violations of a low magnitude to an extreme situation posing imminent or immediate hazard requiring a quick enforcement response.	DEQ Director	1

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SOLID WASTE

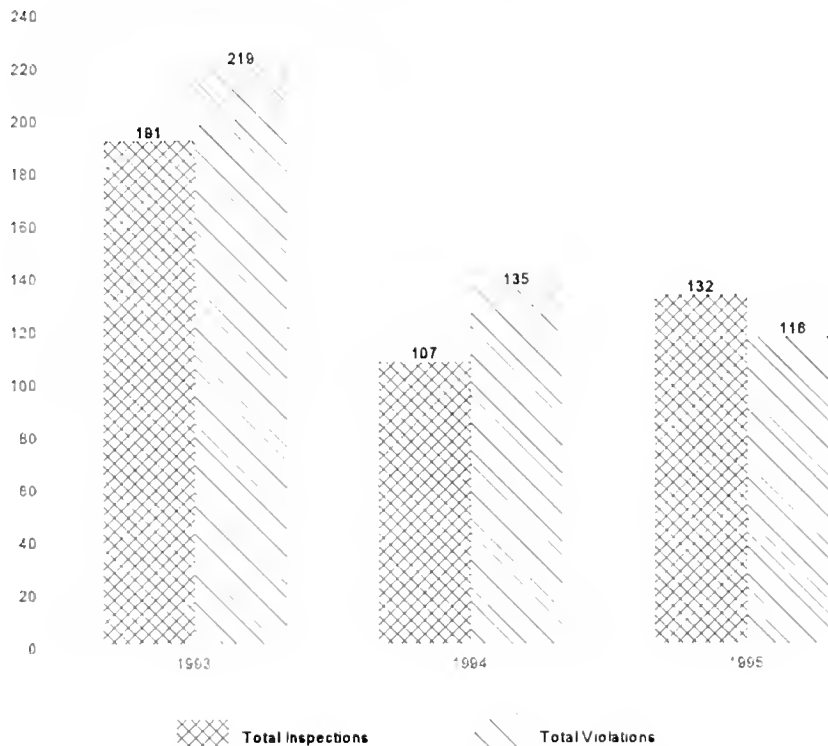
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Admin. Penalties/Sanctions:</b> * Penalties Not Authorized	<p>The possible authorization of the Solid Waste Program to collect administrative penalties has been considered in the past. However, considering that the regulated community consists largely of local governments, current thinking is that use of this type of enforcement action would create economic hardships for the facility operator (local government) and cause considerable conflict between state and local governments. Such hardships and conflicts may outweigh the usefulness of this type of enforcement tool.</p>	N/A	N/A
* Sanctions	<p>Withdrawal of approval or license revocation or injunction to force cessation of the activity can be used in serious situations at chronically out-of-compliance facilities or if the violation is posing an imminent and substantial risk to public health or the environment. Use of this enforcement tool requires serious consideration be given to the impacts that the loss of disposal services may have on users of the facility, the public health and the environment in relation to the threats posed by the violation.</p>	DEQ Director	0
<b>Civil Judicial Action:</b>	<p>Civil judicial actions are used as a punitive measure in extreme situations where a facility or party involved has become recalcitrant and all other efforts to gain compliance have failed or a serious threat to public health or the environment exists.</p>	DEQ Director	0
<b>Criminal Judicial Action:</b>	<p>Misdemeanor criminal penalties can be used for facilities or parties that knowingly and willfully violate the laws and rules and have resisted efforts of voluntary compliance.</p>	DEQ Director	0

**8. History of Compliance.** Pre-1991, the Solid Waste Program had little presence within the regulated community. With only a few employees and more than 240 solid waste management facilities, the program's enforcement presence was minimal and primarily focused on the most severe violations. Since that time the program has been allowed to expand and increase its enforcement presence as well as the educational and training opportunities provided to operators. With these increased efforts the program has seen a continual decline in the number and the severity of the violations noted. The following graphs illustrate that point.



## Solid Waste Management

Inspections and Violations



With the implementation of the new federal and corresponding state regulations governing the disposal of municipal waste, the state has seen a decrease in the number of licensed Class II landfills. Many facilities faced with the substantially more stringent requirements have chosen to close their operations and transport their wastes to a larger regional facility that can distribute the costs of the new requirements over a larger user base. Generally these larger facilities are more capable of handling the financial burden of compliance. Even though there has been a decrease in the number of licensed facilities, the department has not seen a corresponding decrease in the workload required. The more stringent requirements have created more compliance issues and a greater need for education and training of facility operators. On-site inspections require more time to perform; design and plan reviews are much more technical and time consuming; and an increase in educational efforts has been required.

**9. "Violations."** Violations at solid waste management facilities can generally be grouped into two broad categories: design and operational. Design violations involve the construction and environmental protection features that must be incorporated in the facility. Operational violations involve the standards by which the facility must operate. Violations can be further divided into major and minor violation categories. Criteria considered for major or minor designation of a violation include the magnitude of the situation causing the violation, the potential for the violation to cause human or environmental impacts, and/or the frequency of the violation. Major violations should be corrected immediately to prevent further enforcement actions.

Minor violations should be corrected as soon as possible to prevent them from becoming major violations. Major violations for which enforcement actions are being considered can be further divided into magnitude of violation (low, moderate, high, severe, and emergency) as described in the program's *Compliance and Enforcement Guidance Manual*.

Of the 135 violations discovered at licensed solid waste facilities in 1994, 96 of those violations were considered to be major and 39 were minor. Of the 116 violations found in 1995, only 58 were major and 58 were minor (See previous graphs). In addition, 48 recorded complaints concerning nonlicensed facilities resulted in another 12 documented violations.

One factor that has played a role in the number and type of violations noted in the last several years is the advent of the revised federal regulations for the disposal of municipal waste and the corresponding changes to the state regulations. Landfill operators that were unprepared to implement the necessary changes have found themselves in violation of the new requirements. However, nearly all of these facilities are now making progress in implementing the changes and will be able to remove these particular areas of noncompliance from the noted violations once completed. This will likely result in a further decrease in the number and severity of violations recorded at solid waste facilities.

**Discovery of Violations.** Violations are identified through on-site inspections and investigation and through review of environmental monitoring data submitted to the program. Citizen complaints will also be investigated to determine if there is a valid basis for the complaint.

<b>Group</b>	<b>Total Complaints/Inspections</b>	<b>Violations Discovered, by method, 1995</b>			
		<b>Agency Review of Monitoring Reports</b>	<b>Self-Reporting of Violation</b>	<b>Inspection</b>	<b>Citizen Complaint</b>
Burn Site	9/12	N/A	0	9	0
Compost Site	2/1	0	2	0	0
Infectious Waste Treatment Facility	0/1	0	0	0	0
Class II Landfill	138/47	19	29	90	5
Class III Landfill	10/48	N/A	0	7	3
Solid Waste Incinerator	0/1	0	0	0	0
Class III Resource Recovery Facility	0/2	N/A	0	0	0
Soil Treatment Facility	0/4	0	0	0	0
Transfer Station	7/8	N/A	0	6	1
Container Site	2/1	N/A	0	2	0
Unlicensed Landfill	2/4	N/A	0	2	0
Other <sup>1</sup>	<u>12/48</u>	<u>N/A</u>	<u>0</u>	<u>0</u>	<u>12</u>
<b>Total</b>	<b>187/177</b>	<b>19</b>	<b>31</b>	<b>116</b>	<b>21</b>

Notes:

1. "Other" includes mainly investigations of citizen complaints regarding illegal disposal of solid waste.

**10. Considerations in Calculating Penalties.** Currently the program will attempt to collect the full penalty allowed by law when a formal enforcement action is taken. This policy is being modified by the development of a penalty calculation formula. The program will consider the frequency of violations and has formal criteria for judicial enforcement.



**11. Resolution of Noncompliances.** To date, all formal enforcement actions are closed. There are no on-going formal enforcement actions. A summary of all formal enforcement actions since 1993 is provided below.

<b><u>Solid Waste Program Formal Enforcement, by Type and Status</u></b>					
<b><u>Year Action Taken</u></b>	<b><u>Type of Landfill</u></b>	<b><u>Desc. of Violation</u></b>	<b><u>Penalty Assessed</u></b>	<b><u>Status at Year End</u></b>	<b><u>Significant Violation?</u></b>
1992	Private	Violation of consent decree and compliance plan and schedule	None	Closed	No
1993	Municipal	Operation without a license	\$15,000 <sup>1</sup>	Closed	Yes
1993	Municipal	Operation without a license	None	Closed	Yes
1993	Municipal	Operation without a license	None	Closed	Yes
1994	Private	Operation without a license	None	Closed	Yes
1995	Private	Failure to compact and cover waste	None	Closed	No

Notes:

1. This penalty resolved all three municipal violations from 1993.

Of the 187 violations identified in 1995, approximately 150 have been completely resolved through informal means. Most of these have been resolved using notices of violation, inspection reports, and technical assistance.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Solid Waste Program.

- Redefine waste groups in rules to provide for additional waste groups and classes of landfills. Certain types of non-municipal wastes currently considered Group II waste, such as portions of the construction and demolition debris waste stream, do not need the same environmental protection controls that current Class II landfills provide. As a result, these types of wastes are costly to dispose of in Class II landfills. Developing additional groups and appropriate classes of landfills for them will reduce disposal costs and eliminate much of the illegal disposal occurring.
- Work with the program attorney and staff of the DEQ Enforcement Division to develop a penalty calculation guidance document which will take into consideration frequency of the violation, economic gains from noncompliance, magnitude of the violation, defendant's ability to pay, and other factors.
- Develop additional guidance documents and educational materials for operator use in compliance with the regulations.
- Work with the Montana Association of Counties and Montana State University Extension Service to develop additional formal training seminars for solid waste management facility operators.
- Develop a new and expanded electronic data base programs for the tracking of facility compliance monitoring data such as ground water testing results, methane monitoring data, inspection results, complaint investigation tracking, and a facility chronological history tracking system, that are comprehensive and user-friendly.
- Work with the Department of Public Health and Human Services to develop a well-defined coordination of regulatory activity and rules that may be necessary for full implementation of the Infectious Waste Management Act.
- Reevaluate and make changes to the program's Site Disposition Policy and working arrangements with other programs and agencies in consideration of recent governmental and departmental reorganizations to assure that site regulation, monitoring, and review are being

handled by the appropriate entity.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** Montana's solid waste management regulations have been modified and adopted as counterparts to the Federal Resource Conservation and Recovery Act Subtitle D regulations. With those changes the solid waste management program has received approval from the Environmental Protection Agency. This approval means that the DEQ has primacy for the regulation of solid waste disposal in the State of Montana. The nature of the program approval is such that the EPA has determined that Montana's regulations and program structure assure that the minimal federal requirement will be met in Montana. With this determination and approval, the EPA does not have any direct oversight with the state program. However, should the state's regulations or program change, the EPA can make a determination that the program is no longer adequate and remove approval, if necessary.

The DEQ does not receive any funding from the EPA for the operation of the solid waste program so there is no EPA oversight, review, or reporting required of the program.

**Partnerships.** The program has an intra-department Site Disposition Policy for the division of roles and responsibilities among the Department's CECRA, LUST, Hazardous waste, Water quality, and air quality programs. The Department of Agriculture and Abandoned Mines program are included in this policy as well.

Additionally, the statutes exempt certain activities from regulation under this program. The Solid Waste program will defer responsibilities for these activities to the appropriate administrative agencies. This issue will be reevaluated due to the recent state agency reorganization.

**Delegated Authority.** The solid waste management program does not have any delegated authorities, although the program does work with local health departments when necessary to make initial investigations of complaints.

# Motor Vehicle Recycling and Disposal Program

Montana's constitution provides for certain inalienable citizen's rights which includes the right to a clean and healthful environment. The state legislature has unilaterally, without federal mandates or pressure, declared that junked motor vehicles as defined in state law interfere with the public's right to a clean and healthful environment. While there can be ancillary public health and safety issues involved, this program is primarily intended to provide for a clean environment through aesthetic improvement by requiring motor vehicle wrecking facilities to be regulated and junked motor vehicles to be screened from public view or removed and recycled.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Motor Vehicle Recycling and Disposal (MVR&D) Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II, Section 3 and Article IX Section 1 which states;**  
"1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.  
2) The legislature shall provide for the administration and enforcement of this duty.  
3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."
- **Montana Motor Vehicle Recycling and Disposal Act (MAR.&D Act) (MCA 75-10-501, et. seq.)** provides for licensing of wrecking yards, and the regulation, collection and recycling of junked motor vehicles.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)

- **Junkyards Act** (MCA 75-15-201 et. seq.)
- **Montana Solid Waste Management Act** (MCA 75-10-201, et.seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)

Related federal authorities:

- **none**

Motor Vehicle Recycling and Disposal administrative rules:

- ARM 16.14.201

Specific enforcement authority:

- MCA 75-10-514, 541,& 542.
- ARM 16.14.201

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based upon the above-referenced guidance, the Motor Vehicle Recycling and Disposal (MVR&D) Program has identified the following program goals:

1. Require that junked motor vehicles in Montana be shielded from public view, or removed and recycled.
2. Require that all motor vehicle wrecking facilities be licensed and shielded from public view.
3. Provide funding for the establishment of county programs to assist in these goals.

**3. Program Activities.** In general terms, staff effort is divided between 15% licensing and 85% inspection and enforcement, but many enforcement actions involve licensing actions as well. Budgeting is not directly driven by this percentage. In very real and understandable terms, the state Motor Vehicle Recycling and Disposal Program is one of the more compliance and enforcement oriented environmental

programs in the state. It simply requires motor vehicle wrecking facilities (MVWF or wrecking yards) to be licensed and screened and it requires all junked vehicles (JVs) to be shielded from public roads. It's effectiveness is plainly visible and comparable with other areas or states without such a program. These activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg. Years Staff Retntn.</u>	<u>FY 1996 Projects/Sites</u>	<u>Avg. Avg. # of new Acres/Site proj./yr</u>
Wrecking Yard Licensg	\$46,148			178( + 36 pending)	N.A.
Co. Vehicle Graveyards				46	N.A.
Co. JV Grants & T/A	\$883,777			56 counties	5,932 JV's hauled FY 95
Insp./Enforcement	\$78,623				
JV recycling contracts,					
admin & prog support	\$65,139			5	4,377 tons recycled
total	\$1,073,688	3.71 <sup>1</sup>	2.8 yrs. <sup>1</sup>		

Notes:

<sup>1</sup> Includes: .21 FTE attorney (vacant since 11/24/95); 1 FTE Program manager (4½ years in Program); 1 FTE Environmental Specialist (14 months in Program); 1 FTE Info Systems Spec.(7 months in Program), and .50 FTE Administrative and Administrative Support.

source: Stankey, 1996.

**Fees and Charges.** The Motor Vehicle Recycling and Disposal (MVR&D) Program revenues from fees and charges are earmarked for use in the program. The amounts of all fees are set in statute. The revenue derived from the recycling of junked vehicles is variable depending on the number of vehicles collected and sold for recycling and the price of scrap metal. Additional information on fees and charges is presented in the table below.

<u>Type</u>	<u>Authorized Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
<b>Permit Application Fees:</b>			
MVWF Licenses & Renewals	\$50/yr; both	\$9,513	MVR&D program
County MV graveyrd licnse	0	0	"
Junk Vehicle regis. fee	\$.50/vehicle lic.	\$421,168	"
Junk Vehicle title transf fee	\$1.50/vehicle lic.	\$342,138	"
JV Recycling revenue	market price/ton	\$238,693	"
Pvt MVWF vehicles at Co. yards	\$2/vehicle	0	"
Noncompliance Penalties:	varied	0	General Fund
MEPA Fees:	varied	0	MVR&D program
<b>TOTAL:</b>		<b>\$1,011,512</b>	

source: Stankey, 1996.

**4. Regulated Communities.** Any individual or business that owns or possesses an unlicensed motor vehicle which, because of its physical condition, is defined by statute as a junked vehicle, can be a part of this program's regulated community. Examples include auto repair shops, towing businesses, motor vehicle wrecking facilities, and individual vehicle owners. The counties of Montana can become part of the regulated community also, due to some mandates established under this program. The junked motor vehicle community is described below.

**Private individuals** are those vehicle owners who, for one reason or another, end up having derelict or "junk" motor vehicles on their property. Perhaps they were abandoned by others, former landowners or tenant renters for example, or

perhaps they were an intended stock car project or parts vehicle that didn't happen. A motor vehicle which is inoperable, unlicensed and discarded, ruined, wrecked or dismantled is a junk vehicle by state law and is required to be shielded from public view (fenced, garaged, put over the hill, etc.) or removed. If the owner cannot license, make operable or shield the vehicle, he and the vehicle typically become the subject of neighborhood complaints and subsequent action by the program at the state or county level.

**County Junk Vehicle Programs** are required to be established by the county commissioners in each county (multi-county programs are allowed and in place). The county establishes a motor vehicle "graveyard" (CMVG) for the storage of junk vehicles and, as funds allow, provides for a free vehicle collection program and a compliance and enforcement program managed by county officials. The state provides annual grants to the counties to fund their programs. County vehicle graveyards are subject to shielding requirements and record keeping requirements.

**Private Motor Vehicle Wrecking Facilities (MVWFs)** are required to be licensed for operation by the program and are subject to shielding and record keeping requirements. New MVWF's cannot be licensed unless they can be shielded from public view (public roadways) and meet local zoning requirements or obtain location approval from the County Commissioners. Private MVWFs are required to keep junk vehicle inventory record information. The DEQ program cooperates with the Department of Justice Motor Vehicle Division to minimize stolen vehicle titling and registration problems.

**5. Philosophical Approach to Compliance.** The program goals include: that no junked motor vehicles be visible from public roadways in Montana, that they are screened from view or nudged into whatever recycling stream is available through program compliance and enforcement efforts. The program utilizes a combination of education and compliance inspections. The inspections are performed by either county program personnel, the state program personnel, or both. Self implementing administrative rules require licensed wrecking facilities and county vehicle graveyard facilities to remain in compliance with shielding, record keeping and licensing requirements. Informal enforcement actions are taken by program inspectors when minor violations are noted. Major violations are identified and documented by the inspector who then recommends an enforcement action to the program manager. The program manager reviews the information and decides on a course and level of enforcement based on the Program Enforcement Policy. If the course of action is determined to be judicial enforcement, a written enforcement request is developed and recommended to the division administrator. The division administrator then informs the department director and requests that the department Legal Unit be authorized to pursue the enforcement action.

**6. Compliance Tools Available and Used.** The program's formal inspection and enforcement procedures are documented in its *Enforcement Strategy Flow Chart and Narrative*. Enforcement tools include both formal and informal enforcement actions. Formal enforcement actions are license suspension, revocation, or denial, or civil or criminal judicial actions. Informal enforcement tools include other actions that seek to gain voluntary compliance, such as compliance plans, education, persuasion, warning letters or notices of violation.

The following enforcement authorities are provided in the Motor Vehicle Recycling & Disposal Act:

Administrative Enforcement:	75-10-514, MCA
Injunction:	75-10-541, MCA
Civil Penalties:	75-10-541, MCA
Criminal Penalties:	75-10-542, MCA

The menu of tools used by the Motor Vehicle Recycling and Disposal Program is shown on the following pages.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with the MVR&D program law and regulations are:

- One on one compliance inspections and visits from state or county program personnel which explain the program's requirements and provide alternatives for compliance.
- Peer pressure to repair, shield or remove derelict vehicles.
- Referral to and the availability of an active private vehicle salvage industry in the vicinity.
- Availability of a free junk vehicle removal service through the county programs.
- Judicial action with the possibility of the court awarding significant civil penalties.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- MOTOR VEHICLE RECYCLING AND DISPOSAL PROGRAM**

<b>Tools Authorized, by Category</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/T.A.:</b> Pamphlet/brochures explaining program and removal services.  On-site Technical Assistance  Technical Seminars	Upon receipt of complaint regarding junk vehicles	state\County programs	N/A <sup>1</sup>
	When dealing with licensed, proposed or unlicensed motor vehicle wrecking facilities	state\County	N/A <sup>1</sup>
	Opportunities to provide on-site technical assistance for MVWF occur during inspections, at meetings between industry association and state, and at professional symposia.	state\County	250 +
	Training opportunities for county program officials occur as needed with county staff changes and at statewide program meetings	state staff	50 +
<b>Comprehensive Planning/Withdrawals:</b> Agency determination of lands unavailable for siting a MVWF or County MV graveyard.	When a proposed MVWF or new county vehicle graveyard site cannot be shielded from public roads due to the topography/proximity.	state staff	0
	When a proposed site could be too environmentally sensitive for the proposed use as determined through the MEPA process.	state staff	3
	When a resolution in opposition to the proposed facility location has been prepared and submitted to the agency by the County Commissioners in accordance with MCA Sect. 75-10-516.	Co. govt and state staff	4

STATE COMPLIANCE/ENFORCEMENT TOOLS -- MOTOR VEHICLE RECYCLING AND DISPOSAL PROGRAM			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Permits/Certifications/Bonds:</b> County MV graveyard license  Private MVWF license	Issued to a county upon application provided the site meets shielding and land use requirements. Counties mandated to provide for a site. No fee  Issued to individuals/businesses upon application, \$50 annual license fee and provided site meets shielding and land use requirements.  Newly proposed facility Conditionally Approved to be Licensed; License pending, shielding to be constructed before license issued.  Renewed annually; granted if no violations, \$50 annual license renewal fee Renewal requested; county inspection not yet performed.	state staff  state staff  state staff	46  7  4
License Renewal  MEPA: - EAs  Opportunity for Public Comment	Renewed annually; granted if no violations, \$50 annual license renewal fee Renewal requested; county inspection not yet performed.  The Department typically prepares Environmental Assessments (EAs) for new Motor Vehicle Wrecking Facilities and county motor Vehicle graveyards.  Public notices and opportunity for comment occur following agency receipt of a license application for a new wrecking facility or county vehicle graveyard and the preparation of an EA. Also, MCA 75-10-516 provides that adjoining property owners and the Co. Commission be notified of a proposed licensing action. The county is permitted to hold hearings and provide the agency with a resolution of support or opposition to the proposed licensing action.	state staff  state staff	178 36  16
Certifications/or bond requirements	Not Authorized	N/A	N/A  32 +



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- MOTOR VEHICLE RECYCLING AND DISPOSAL PROGRAM

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> Informal	Performed continuously on ad hoc, time-as-available, basis.	state\County	238 +
Complaint-Generated Inspections	For failure to shield junk vehicles	state\county	over 2000
	Failure to shield MVWF	state	12 +
	Failure to shield Co MV graveyards	state	1
	Operating a MVWF w/o a license	state	9 +
Quarterly Reports	Private MVWFs required to send records and titles of vehicles placed in inventory every quarter to the Dept. of Justice Motor Vehicle Division	state\county\ Dept. of Justice	1005
<b>Administrative Notices/Orders:</b> Notice of Violation	Upon identification of violation; typically occurs in the field. Request for a compliance plan typically within 10 days; compliance schedule depends on individual circumstances and significance of violation, typically between 14 and 30 days for minor violations.	state\ county programs.	20 +
Orders	Not authorized	N/A	N/A
<b>Administrative Penalties\Sanctions:</b> Penalties:	Not Authorized		
Sanctions: License Issuance, Revocation, Suspension or Denial	For violations of the law and rules and for fraud, title forgery, dealing in stolen parts.	Director <sup>2</sup>	1
Appeals	To the Board of Environmental Review within 30 days of agency's decision to issue, deny or revoke license.	Board	

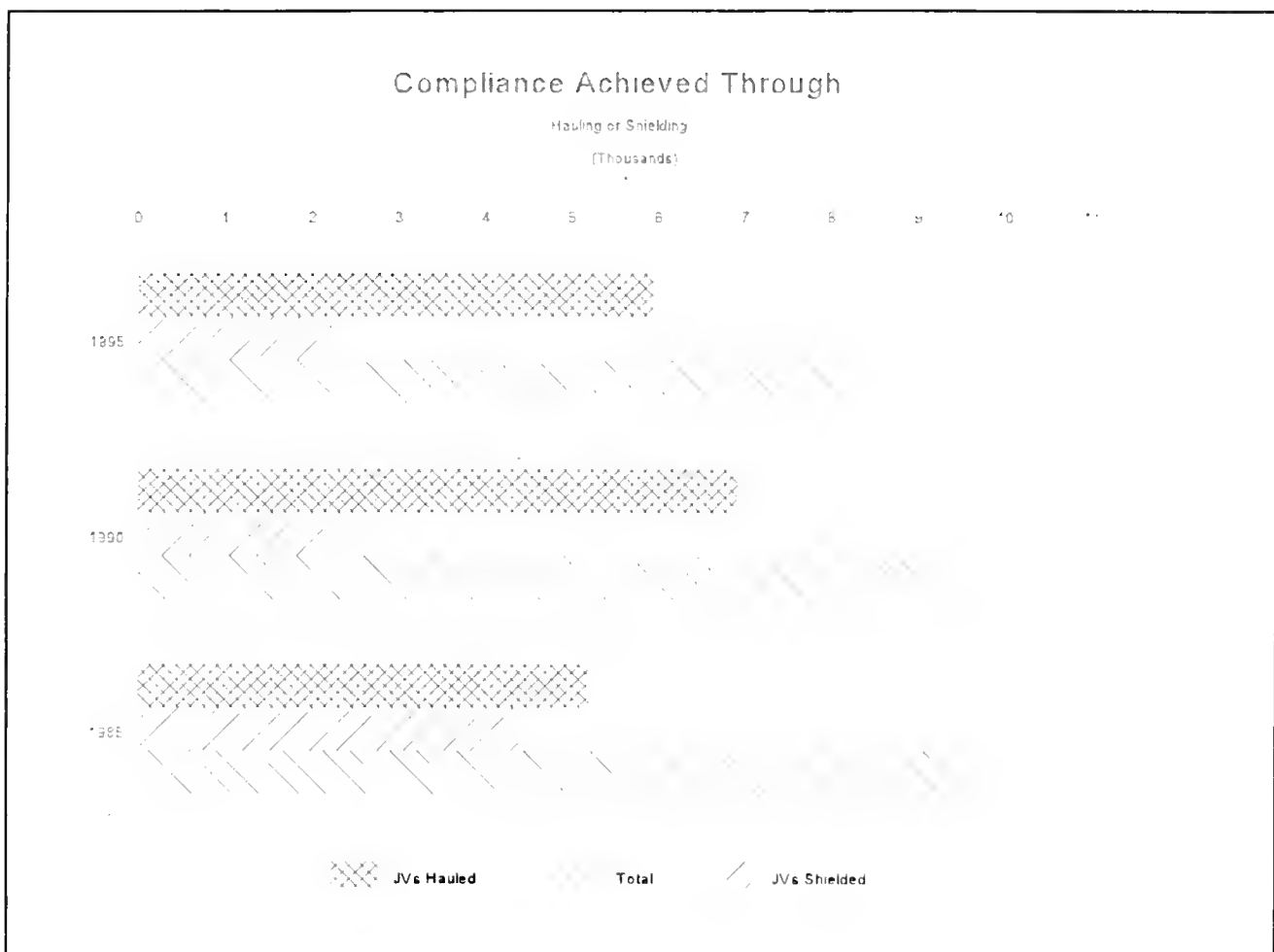
STATE COMPLIANCE/ENFORCEMENT TOOLS -- MOTOR VEHICLE RECYCLING AND DISPOSAL PROGRAM			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Judicial Civil Penalties:</b> Penalties  Injunctions: Permanent Temporary	Maximum \$50/day of violation; for MVWFs failure to keep and submit vehicle records to Mont. Dept. of Justice.	MDOJ Staff	0
	Maximum \$50/ day of violation; for violations of MVR&D Act law, rule or DEQ order.	District Court	0
	Only authorized when MVWFs or county MV graveyards operate in violation of law and/or rules.	District Court	0
<b>Judicial Criminal Penalties:</b> Misdemeanor	Misdemeanor charges may be filed for <u>willful</u> violations of the law; maximum fines of \$250 and/or 30 days in county jail. (tool predominantly used by county programs)	Director\county programs	57 +

Notes:

- 1 Numbers not kept of pamphlets distributed; routinely used as an educational and contact tool.
- 2 Action recommended by program manager, reviewed and approved by supervisors and approved and authorized by director.

**8. History of Compliance.** Trends in compliance with the Motor Vehicle Recycling and Disposal Program rules and requirements are illustrated below. This state program is unique in that over \$865,000 in grants are provided to county governments to establish and implement their own programs. County programs range from those simply providing a free county motor vehicle graveyard site where people can dispose of their unwanted junk vehicles, to those which provide a site and a free vehicle collection service, to the most developed programs with large budgets and fully developed compliance and enforcement programs. Most of the inspections and compliance efforts which deal with individuals and small businesses are conducted by the county programs. State program staff provide compliance and enforcement services in counties needing assistance with difficult cases or in those counties which do not have a compliance and enforcement program. The state program staff also concentrates its efforts on licensed and unlicensed motor vehicle wrecking facilities. Any compliance and enforcement data that includes the state program staff efforts alone is not reflective of the program's total work.

Trends in compliance are shown below.



**9. Violations.** The resource commitment to enforcement/compliance equates to 85% of the total work performed by the state level program staff. Enforcement actions are limited due to the small office staff. According to the program, enforcement can only be as effective as the amount of resources available; limited resources result in limited enforcement.

Over 2,000 violations were documented during FY 95 by state and county program staff. Of these, 1,900 were of minor significance and were dealt with informally. Forty (40) were determined to be of moderate significance and were dealt with informally using a written compliance plan. The remainder (60 violations) were deemed major or significant and were dealt with as discussed below.

The state program currently has 6 cases in litigation (all filed prior to FY 95) and has recently requested that 2 additional judicial enforcement actions be initiated. The program anticipates that 1 additional judicial action will be requested within the next month. Additionally, 57 cases have been referred by county program directors to county attorneys for appropriate legal action.

<b>1995 MVR&amp;D Program violations by Type and Status</b>					
<b>Viols Discovered</b>	<b>Type of Operator</b>	<b>Desc. of Violation</b>	<b>Penalty Assessed</b>	<b>Status at Year End</b>	<b>Significant Violation?</b>
2399	Individuals	Possession of Junk Vehicles Junk Vehicles in public view	0	Closed	57
361	MVWF	Dept of Justice Quarterly Report	0	Closed	0
136	MVWF	Shielding Violations	0		3
8	MVWF	Failure to re-license	0	Closed	3
3	MVWF	Failure to license & shield	0	Judicial	3
31	CMVG	Failure to number inventory /shielding	0	Resolved	0

**Notes:**

1. Violations noted for MVWF = number in that category but there may be additional violations of a different category at any one facility.
2. 57 judicial actions are being taken by the county programs, 3 judicial actions have been requested by the state program, 6 judicial actions filed prior to FY 95 are still in court.

source: Stankey 1996.

**Discovery of Violations.** The program identifies and documents violations through two means: inspections performed by either the state or county personnel either independently or as the result of citizen complaints, and by review of information provided via the Department of Justice. Violations discovered and identified by an inspection are documented on an inspection report form; violations discovered through the review of Department of Justice information are recorded electronically in the program data base.

Violations Discovered, by method, 1995<sup>1</sup>

<u>Group</u>	<u>Total</u>	<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Citizen Inspection Complaint</u>
MVWF	531	391	0	136
Individual JV owners	2399	N/A	N/A	4
County MV graveyards	31	0	0	2,399
				1
<b>TOTAL</b>	<b>2961</b>	<b>391</b>	<b>0</b>	<b>166</b>
				<b>2404</b>

**Notes:**

1 Data incomplete because some counties not required to report these statistics.

source: Stankey, 1996.

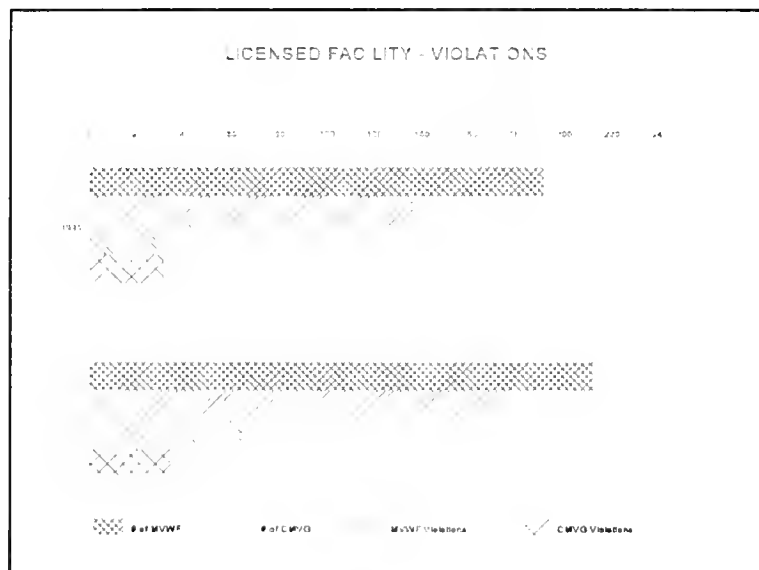
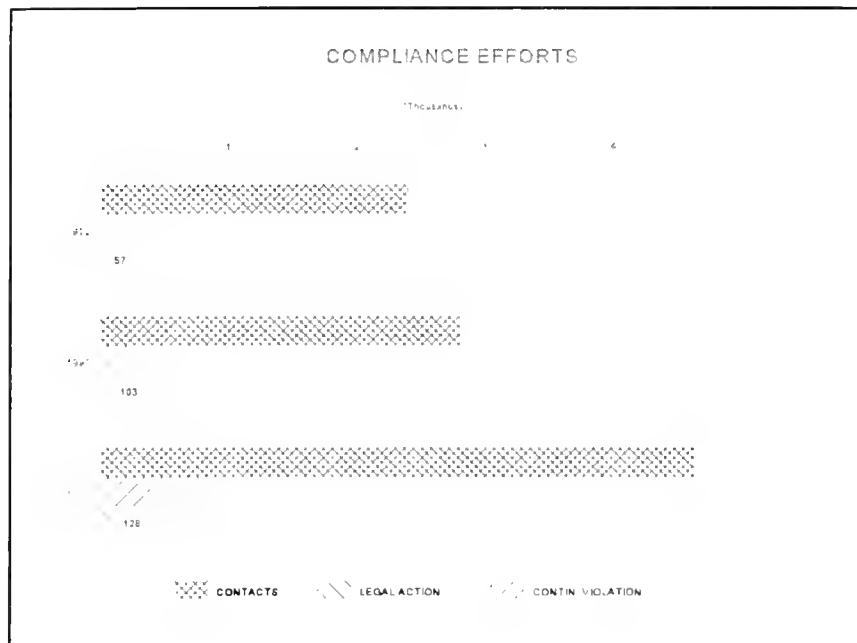
**10. Considerations in Calculating Penalties.** The Motor Vehicle Recycling and Disposal Program has in place a written enforcement guide and strategy. The program utilizes a classification of major, moderate, or minor for the degree of significance in determining an appropriate enforcement response. These categories relate to: 1) the degree of deviation from the statutory or regulatory requirement, 2) the type of violation (i.e., aesthetic, operational or procedural), and 3) any pattern of repeat violations. Moderate/minor classifications are responded to commensurate with the seriousness of the violation and in accordance with a program policy and enforcement guideline. Minor or moderate violations are generally handled by identifying the violation(s) and negotiating a compliance plan to correct the violation within a reasonable time (usually 14 to 30 days). The time allowed in the compliance plan is discretionary and negotiable by the inspector and his/her supervisor and may be extended for good reasons, such as adverse weather conditions.

Major violations are partially defined in MCA Section 75-10-514, dealing with fraud, vehicle theft, and forgery. Recalcitrant facility operators or individuals are typically determined to be major violators and may be referred for formal enforcement action. A facility file review is conducted to identify recurrent violations for determining the appropriate enforcement response. Recurrent and repetitive violations increase the enforcement response to the next higher level. Thus, violators who are regularly found to have the same or many violations may be classified as major violators subject to formal enforcement actions.

When judicial enforcement actions are initiated, the program typically seeks the maximum penalty allowed under the statutes. Maximum penalties for this program are relatively low; \$50/day civil and \$250 criminal misdemeanor and/or 30 days in county jail.

**11. Resolution of Noncompliances.** According to program staff, this is not often a problem except for the priority of time and legal assistance. Staff estimates that 92% of program violations are resolved with a field visit and advice with an informal notice or warning. Of the remaining 8%, a more formal warning letter/notice of violation approach with a resolution by compliance plan scheme will resolve 70% of the remainder. The other 30% of the 8% become subject to judicial actions. This means that somewhere in the range of 2% of the total violations noted by the program go to court for resolution.

In recalcitrant cases, the program suffers from a lack of enforcement assistance and prioritization. Staff have suggested that the authorization of administrative civil penalties would be beneficial. An indication of the number of contacts made by state and county program officials and compliance resolution is shown on the following page.



**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the MVR&D program.

- Require that all motor vehicle wrecking facilities (MVWFs) be properly shielded and licensed.
- Require all junk vehicles to be shielded from public view in Montana.
- Require that all wrecking facilities comply with the Department of Justice reporting requirements in a prompt and timely manner.
- Require that county motor vehicle graveyards (CMVGs) comply with all other state and federal waste management requirements.

- The agency has identified the following short term priorities for the MVR&D compliance and enforcement program:
- Train new county program managers.
- Train all county program managers in compliance requirements, methods and techniques useful in obtaining an increased level of compliance within their jurisdictions.
- More effort on Tribal lands/co-operative agreements.
- Increased inspections of MVWFs and CMVGs by state staff.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** The Montana Motor Vehicle Recycling and Disposal law has no federal counterpart. It is a state of Montana initiative funded entirely by vehicle registrations, wrecking yard licenses and the revenue (if any, depending on scrap steel markets) from recycling vehicles the program collects.

**Partnerships.** The DEQ program coordinates anti-theft and fraud efforts with the Department of Justice in requiring record keeping by MVWFs and by requiring junked vehicle titles to be submitted to the state.

**Delegated Authority.** The DEQ, MVR&D Program delegates most of its authority to the county junk vehicle programs. The state retains the authority to license MVWFs and county motor vehicle graveyards and its authority to contract for the crushing and recycling of vehicles collected in the county yards.

# Hazardous Waste Program

The Hazardous Waste Program regulates hazardous waste and used oil handlers that are not required to obtain a permit and is responsible for the regulation of facilities that are required to obtain a permit for the treatment, storage, or disposal of hazardous waste.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Hazardous Waste program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II, Sec. 3** "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment..."
- **Montana Hazardous Waste and Underground Storage Tank Act** (MCA 75-10-401, et seq.) makes it public policy to protect Montana's public health, the health of living organisms and the environment from the effects of the improper, inadequate, or unsound management of hazardous waste.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Montana Solid Waste Management Act** (MCA 75-10-201 et seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et seq.)
- **The Montana Solid Waste Management Act** (MCA 75-10-201, et seq.)

- **Comprehensive Environmental Cleanup and Responsibility Act** (MCA 75-10-701, et seq.)

Related federal authorities:

- **Resource Conservation and Recovery Act (Subtitle C)**
- **Resource Conservation and Recovery Act (Subtitle D)**

Hazardous Waste administrative rules:

- ARM 17.54.101 et seq.

Specific enforcement authority:

- 75-10-413, MCA
- 75-10-414, MCA
- 75-10-416, MCA
- 75-10-417, MCA
- 75-10-418, MCA
- 75-10-424, MCA
- ARM 17.54.155

Primacy/jurisdictional agreements:

- State program approval and primacy from federal Environmental Protection Agency

**2. Program Goals.** Based on the above-referenced guidance, the Hazardous Waste Program has identified the following program goals.

1. To administer the program in a manner that provides the greatest protection of public health and the environment from the deleterious effects of improperly managed hazardous waste. Implement adequate planning, maintain budgetary controls, provide adequate staff supervision, and negotiate State/EPA agreements that are consistent with state policies and priorities.
2. To obtain authorization for all program components which have counterparts in the federal program under the Resource Conservation and Recovery Act. Maintain and enhance the resources necessary to execute authorized functions, adopt required administrative rules necessary to exercise regulatory authority, and submit authorization revision applications to EPA as soon as possible.
3. To insure that hazardous waste treatment, storage and disposal facilities are properly designed, maintained, and operated. Approve or deny facility permit application, issue new operating permits or permit modifications as expeditiously as possible, and insure compliance with permit conditions at permitted facilities through regular compliance evaluation inspections.
4. To assure regulatory compliance at sites where hazardous waste is generated, transported, recycled or otherwise handled by conducting regular comprehensive compliance evaluation inspections at those installations that offer the greatest threat to public health and the environment.
5. To provide technical and compliance assistance to hazardous waste handlers at every opportunity possible in order to maintain and enhance regulatory



compliance and to assist in minimizing the amount of hazardous waste generated in Montana.

6. To initiate timely and appropriate enforcement actions against significant violators which are

consistent with the State/EPA enforcement agreement in order to offer a deterrence for future noncompliance and to remove economic incentives for noncompliance.

**3. Program Activities.** The major activities of the Hazardous Waste Program are performed by two Units; 1) the Regulatory Unit which is responsible for the regulation of hazardous waste and used oil handlers that are not required to obtain a permit, and 2) the Permitting Unit which is responsible for the regulation of facilities that are required to obtain a permit for the treatment, storage, or disposal of hazardous waste. These activities are described in more detail below.

Program Activities	FY 96 Budget	FY 96 FTEs <sup>1</sup>	Avg. Years Staff Retntn.	1995 Ongoing Project/Sites	Ave. Acre/Site	Ave. # of new project/Yr
Regulatory Unit	\$231K	4	2.5	252 <sup>2</sup>	N / A	N / A
Permitting Unit	\$342K	6	2.5	12 <sup>3</sup>	N / A	N / A

<sup>1</sup> Does not include 1.0 FTE Program Manager, 0.88 FTE Attorney, and 4.32 FTES of Administrative and Clerical Support

<sup>2</sup> The regulated Community in FY 95 consisted of:

- 94 Large Generators
- 150 Small Generators
- 58 Transporters
- 50 Used Oil Handlers

(Conditionally exempt generators are not quantifiable)

<sup>3</sup> Number of facilities subject to permitting requirements

source: Vidrine, 1996

**Fees and Charges.** Hazardous Waste Program revenues from fees and charges are described below. The program can assess fees for filing and review of hazardous waste management facility permits. The program can also assess tonnage fees from generators of hazardous waste. The program has authority to assess fees associated with new facility permit applications and from the operation of commercial facilities. To date, the department has received a \$50K application fee from Ash Grove. No other fees have been collected. Advanced Environmental Technical Services (formerly Special Resource Management), Rocker, was issued a permit to operate a commercial hazardous waste storage facility in 1992, but has elected not to construct the facility to date. There are currently no commercial hazardous waste management facilities in operation.

All other fees associated with permit modifications and renewals and generator registration are deposited in the state General Fund. In FY 95, the program collected \$31,165 generator registration fees and \$3,400 permit modification fees (see next page).

<u>Type</u>	<u>Authorized Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
<b><u>Permit Fees:</u></b>			
<b><u>TSDF<sup>1</sup> Application</u></b>	\$10K-150K	- 0 - <sup>2</sup>	Program Admin.
<b><u>Reissuance</u></b>	\$2K-10K	\$2K	General Fund
<b><u>Modifications</u></b>	\$100-1500	\$3K	General Fund
<b><u>Commercial T.D.</u></b>	\$4 - 8 / ton	- 0 - <sup>3</sup>	Program Admin.
<b><u>Generator Fees</u></b>	\$75 - 1500	\$31K	General Fund

<sup>1</sup> Treatment, Storage, and Disposal

<sup>2</sup> Authority to assess fees granted in 1993. New applications to operate facilities are not anticipated in the foreseeable future.

<sup>3</sup> Only one commercial facility permit has been issued (SRM). The permittee has not constructed the facility to date.

source: Vidrine, 1996.

#### **4. Regulated Communities.** The Hazardous Waste Program regulates the following entities:

##### **Treatment, Storage and Disposal Facilities (TSDs)**

With certain exceptions, individuals who treat, store or dispose of hazardous waste are required to obtain a permit. Typical waste management units that would require a permit include container or tank system storage, surface impoundments, waste piles, land treatment units, landfills, incinerators, and boilers and industrial furnaces which burn hazardous waste. The permits identify the administrative and technical standards which facilities must adhere. In addition, permitted facilities are also subject to "corrective action" requirements to address releases of hazardous waste or hazardous constituents to environmental media.

Permits are required for operating facilities and for those facilities which previously operated land disposal units in which residuals of hazardous waste remain in place (post-closure care permits). Five facilities have been issued operating permits for ongoing hazardous waste management activities. Seven facilities are subject to post-closure care permits.

##### **Hazardous Waste Generators, Transporters, & Used Oil Fuel Handlers**

Hazardous waste generators, transporters, and used oil fuel handlers are not required to be issued hazardous waste management permits but are rather subject to self-implementing regulatory requirements.

There are three categories of hazardous waste generators: large generators produce more than 2,200 pounds of hazardous waste, or more than 2.2 pounds of acute hazardous waste, within a calendar month; small generators produce more than 220 pounds, but less than 2,200 pounds of hazardous waste, within a calendar month; and conditionally exempt generators produce less than 220 pounds of hazardous waste in a calendar month. The level of regulatory controls increase with the amount of hazardous waste generated. Thus, large generators are subject to the most stringent requirements, while conditionally exempt generators are subject to the least stringent requirements. In 1995, 94 large generators and 150 small generators were registered with the program. The number of conditionally exempt generators is unknown as this category of generator is not required to register or file reports of hazardous waste management activity.

Businesses that transport hazardous waste are required to possess an EPA identification number issued by the program and comply with certain transportation requirements. In 1995, 58 transporters were registered with the program. Of that amount, 13 were private carriers and 45 were "for-hire".

Businesses that market used oil fuel, or in some cases burn used oil fuel in industrial boilers or furnaces, are also required to possess an EPA identification number and comply with applicable used oil management requirements. In 1995, 50 burner/blenders of used oil fuel were registered with the program.

**5. Philosophical Approach to Compliance.** It is the experience of the program that the highest rate of compliance is achieved when resources are directed towards providing compliance assistance to the regulated community, maintaining a high profile within the regulated community through regular compliance evaluation inspections, and initiating enforcement actions, both formal and informal, to gain a return to compliance and to remove the economic incentive for further noncompliance. Allocation of resources in the three areas need to be carefully balanced to achieve maximum benefit. This balance is established by carefully monitoring the results of program efforts and making adjustments in resource allocations as needed.

**6. Compliance Tools Available and Used.** The program provides compliance assistance to the regulated community and ensures compliance through inspections and enforcement actions. Compliance assistance consists primarily of informational efforts which are designed to assist the regulated community in gaining and maintaining compliance with regulatory requirements. Compliance assistance is routinely incorporated into compliance evaluation inspections and other daily interactions with the regulated community. The primary audience of the program's compliance assistance efforts are smaller businesses who generally do not have the resources to stay abreast of complex environmental protection regulations. The program enjoys its greatest compliance assistance success from interacting with handlers who lack of an understanding of the requirements as opposed to handlers who wish to avoid compliance to gain an economic advantage or who otherwise choose to ignore requirements.

On-site inspections play an important role in ascertaining the level of compliance at individual hazardous waste management sites and provide the program with information associated with the regulated community's overall rate of compliance. The information gained from inspections may be used to target certain industries or geographical areas for increased compliance assistance or enforcement efforts. On-site inspections also instills a perception within the regulated community of the program's presence which reinforces the need to maintain compliance.

It is the experience of the program that only a small percentage of hazardous waste handlers willfully disregard regulatory requirements. However, in some cases noncompliance can be very damaging to the environment or can serve to provide financial gain for violators, thereby placing competing businesses at an economic disadvantage. In such cases, appropriate enforcement actions are necessary to restore environmental damage, to remove the violator's economic incentive for noncompliance, and to ensure a level playing field for other competing businesses who are in compliance. The table on the next page illustrates compliance tools available and used by the Hazardous Waste Program:

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM

Tools Authorized by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/T.A.:			
On-Site Technical Assistance	During inspections or at the request of handlers	Program Staff	N/A <sup>1</sup>
Compliance Assistance	Integrated into all interactions with the regulated community	Program Staff	N/A <sup>1</sup>
Fact Sheets/Publications	Distributed upon request, upon registration, or adoption of rules which may impact particular handlers	Program Staff	N/A <sup>1</sup>
Workshops/Meetings	Upon request	Program Staff	15
Comprehensive Planning/Withdrawals	N/A	N/A	N/A
Permits/Certifications/Bonds			
Operating Permits	Issued to owners or operators of new treatment, storage or disposal facilities	Director Approval	0.00
Closure/Post Closure	Issued to owners or operators of facilities who have ceased active management of hazardous waste in regulated units.	Director Approval	2
Modifications	Issued to permittees upon their request or upon the department's initiation	Director Approval	1
Bonding Requirements (financial assurance)	Prior to issuance of a permit, the prospective permittee must demonstrate financial assurance through corporate test ratios, letters of credit, or documented trust funds.	Program Staff	unknown

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM**

<b>Tools Authorized by Category</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Monitoring/Inspections:</b>			
Informal Inspections (Compliance Meetings)	Performed continuously ad hoc as compliance assistance/information effort dictates	Program Staff	unknown
Formal Inspections	The program institutes a formal inspection schedule. Candidates are selected on their potential to be in noncompliance. The program looks at the type of business or activity that have had historical difficulty with compliance to help set their inspection schedule. The program looks at an entities compliance history.	Program Staff	291
<b>Complaint-Generated Inspections</b>	Upon receipt of allegation of noncompliance	Program Staff	30
<b>Sampling</b>	The program is authorized to take samples from any soil or ground water or from any vehicle in which used oil or wastes are transported, or samples of any containers or labeling for the substances, used oil, or wastes.	Program Staff	2
<b>Ordered Monitoring</b>	If the program determines that the presence of a regulated substance or hazardous waste or the release of the regulated substance or waste or any waste constituent may present a substantial hazard to public health or the environment, it may issue an order requiring the owner or operator of the facility or site to conduct reasonable monitoring, testing, analysis, and reporting with respect to the site in order to ascertain the nature and extent of the hazard.	Program Staff	unknown

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM

Tools Authorized by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Administrative Notices/Orders:			
Notice of Violation/Warning Letter	Upon identification of violation. The program may serve written notice of the violation personally or by certified mail on the alleged violator or the violator's agent. The notice must specify the provision of this part, the rule, or the permit provision alleged to be violated and the facts alleged to constitute a violation and may include an order to take necessary corrective action within a reasonable period of time stated in the order. The order becomes final unless, within 30 days after the notice is served, the person named requests in writing a hearing before the board. On receipt of the request, the board shall schedule a hearing.	Program Staff	31
Administrative Orders	The department may issue a cleanup order to any person who has discharged, deposited, or spilled any regulated substance, used oil, or hazardous waste into or onto any land or water in an unlawful or unapproved manner or who has discharged, deposited, or spilled any material or substance into or onto any land or water so as to result in unlawful or unapproved disposal of a regulated substance, used oil, or hazardous waste. The order must direct the person to clean up and remove the regulated substance, used oil, or hazardous waste, to treat the regulated substance, used oil, or hazardous waste so as to render it nonhazardous, or to take other actions as may be considered reasonable by the department.	Director Approval	3

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM**

Tools Authorized by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p>Administrative Penalties/Sanctions: Penalties:</p>	<p>The department may assess a person who violates a used oil or hazardous waste provision or a used oil or hazardous waste rule an administrative penalty, not to exceed \$10,000 per violation. Each day of violation constitutes a separate violation, but the maximum penalty may not exceed \$100,000 for any related series of violations. Assessment of an administrative penalty must be made in conjunction with an authorized order or administrative action.</p> <p>In determining the appropriate amount of an administrative penalty, the department shall consider:</p> <ul style="list-style-type: none"> <li>(a) the gravity and the number of violations;</li> <li>(b) the degree of care exercised by the alleged violator;</li> <li>© whether significant harm resulted to public health or the environment; and</li> <li>(d) the degree of potential significant harm to public health or the environment.</li> </ul> <p>Administrative penalties collected must be deposited in the state general fund.</p>	<p>Director</p>	<p>2</p>

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM

Tools Authorized by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Civil Judicial Action:</b>  Penalties:  Injunctions:	<p>Any violation of the statute or rules or an order of the department or the board, or a permit is subject to a civil penalty not to exceed \$10,000 per violation. Each day of violation constitutes a separate violation.</p> <p>The department may ask a court for injunctive relief to:</p> <ol style="list-style-type: none"> <li>1) immediately restrain any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;</li> <li>2) enjoin a violation of the statute, a rule adopted under the statute, an order of the department or the board, or a permit provision without the necessity of prior revocation of the permit; or</li> <li>3) require compliance with the hazardous waste statutes, a rule adopted under the hazardous waste statutes, an order of the department or the board, or a permit provision.</li> <li>4) If the department is unable to collect the administrative penalty or if a person fails to pay all or any portion of the administrative penalty as determined by the department, the department may seek to recover the amount in an appropriate district court.</li> </ol>	Director Approval  Director Approval	1  unknown



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARDOUS WASTE PROGRAM

Tools Authorized by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Criminal Judicial Action:</b>	<p>Criminal judicial actions are triggered if a person is guilty of an offense under the hazardous waste statutes if the person knowingly: (a) transports any hazardous waste to an unpermitted facility; (b) treats, stores, or disposes of hazardous waste subject to regulation under the hazardous waste statute or the rules without a permit or contrary to a material permit condition; © omits material information or makes any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for compliance with provisions of this part or rules adopted under the hazardous waste statutes pertaining to the handling of hazardous waste; (d) generates, stores, treats, transports, disposes of, or otherwise handles any used oil or hazardous waste regulated under this part or rules adopted under this part and knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed in compliance with the provisions of these statutes, an order issued or rules adopted; or (e) transports or causes to be transported without a manifest any hazardous waste required to be accompanied by a manifest.</p> <p>A person who is guilty of an offense under subsection 1) is subject to a fine of not more than \$25,000 per violation or imprisonment for a period not to exceed 3 years, or both. Each day of violation constitutes a separate violation.</p> <p>A person who knowingly violates any requirement of hazardous waste statutes or any rule or material permit condition issued [except those violations specified in subsection (1)] regarding any hazardous waste that is subject to regulation is guilty of an offense and subject to a fine of up to \$5,000 per violation or subject to imprisonment not to exceed 6 months, or both. Each day of violation constitutes a separate violation.</p> <p>Upon a second conviction for a violation of this section, the maximum penalties specified must be doubled.</p>	Director Recommended/ Court Decision	none

1. On-going basis. Not quantifiable

**7. Incentives for Compliance.** For permitted operating facilities, the greatest incentive for compliance is the threat of permit revocation for noncompliance. Operating facilities are generally able to reduce waste management costs by retaining their permits. Permits are revocable by the department if there is sufficient cause, such as violation of permit conditions. The threat of penalties for noncompliance is also an incentive for permitted operating facilities to comply.

For facilities subject to post-closure permitting requirements (hazardous waste management units are closed) and the universe of handlers who are not subject to permitting requirements, such as generators, transporters, and used oil handlers, the incentives for compliance include the possibilities of penalties being assessed by the department for violations and associated litigation costs. Additionally, many businesses comply because they wish to avoid publicity associated with department enforcement actions. The program routinely prepares press releases associated with formal enforcement actions.

**Agency-Generated.** Compliance assistance is incorporated into program activities at every possible opportunity. The following summarizes some of the program's compliance assistance activities:

- Handbooks and fact sheets have been developed for businesses which translate complex regulatory requirements into plain English.
- Copies of proposed and final rules are provided to those most likely to be affected and to those who specifically request the information.
- Generator registration is used as an opportunity for staff to assist businesses in identifying their hazardous waste streams and waste management responsibilities.
- Compliance evaluation inspections are used as opportunities to assist businesses in identifying waste minimization opportunities and alternative waste management practices which seek to gain and maintain compliance.
- Workshops which assist businesses in identifying their hazardous waste management responsibilities are conducted periodically.
- Program staff participate in speaking engagements before industry groups and other interested parties regarding proper hazardous waste management.

**Industry-Generated.** Not applicable

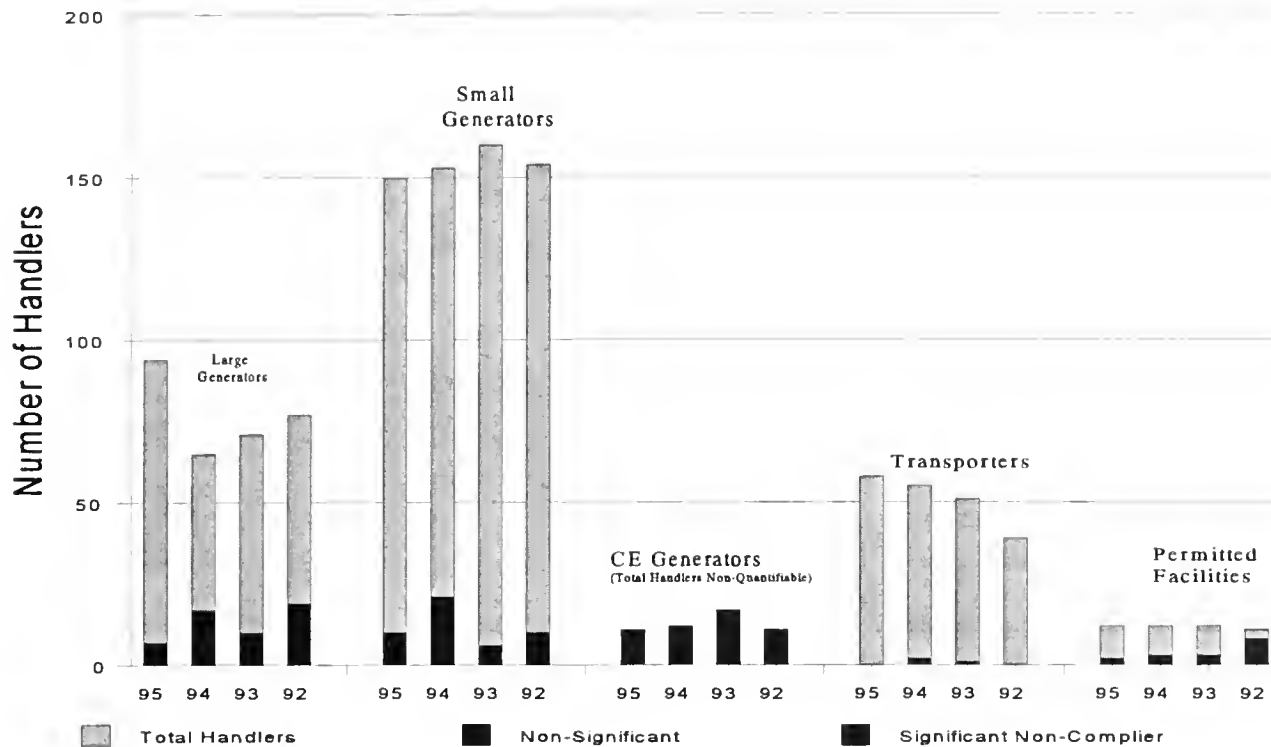
**Other.** Not applicable

**8. History of Compliance.** Trends in compliance with the hazardous waste program's requirements are illustrated below. For purposes of clarification, the Hazardous Waste Program provides the following definitions:

**Significant Noncomplier:** Is considered a "high priority" violator who:

- 1) has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- 2) is a chronic or recalcitrant violator; or
- 3) deviates from terms of a permit order or decree by not meeting the requirements in a timely manner and/or failing to perform work as required by terms of permits, orders, or decrees; or
- 4) substantially deviates from the Resource Conservation and Recovery Act statutory or regulatory requirements.

**Nonsignificant Noncomplier:** Is all other handlers that are not significant noncompliers.



source: Vidrine, 1996.

**9. "Violations."** The program initiated 31 informal enforcement actions and 4 formal enforcement actions in FY 95. The program currently has 6 cases in litigation. There are currently no outstanding enforcement requests.

The following table illustrates the types and status of enforcement actions initiated in FY 95.

**1995 Hazardous Waste Program Violation by Type and Status  
(October 1, 1994 - September 30, 1995)**

Issue Month	Handler Type	Violation Description	Penalty	Year End Status	High Priority Violator <sup>1</sup>
October 1994	Large Generator	No Land Disposal Restriction Notification	-	Resolved	-
October 1994	Small Generator	Exceeded Accumulation Times	-	Resolved	-
October 1994	Exempt Generator	Failure to Characterize Waste	-	Resolved	-
October 1994	Small Generator	Various Container Management Violation	-	Resolved	-
October 1994	Small Generator	Various Container Management Violation	-	Resolved	-
October 1994	Large Generator	Exceeded Accumulation Times	-	Resolved	-

**1995 Hazardous Waste Program Violation by Type and Status  
(October 1, 1994 - September 30, 1995)**

Issue Month	Handler Type	Violation Description	Penalty	Year End Status	High Priority Violator <sup>1</sup>
October 1994	CE Exempt Generator	Halogenated Solvent Registration	-	Resolved	-
October 1994	Large Generator	Various Container Management Standards Violation	-	Resolved	-
November 1994	Large Generator	Container Management Standards Violation	-	Resolved	-
November 1994	Large Generator	Container Marking / Dates Violation	-	Resolved	-
December 1994	Treatment Storage or Disposal Facility	Permit Condition Violation		Resolved	-
December 1994	Used Oil Handler	Failure to Notify Re: Used Oil	-	Resolved	-
December 1994	Large Generator	Container Violation	-	Resolved	-
December 1994	Small Generator	Open Container	-	Resolved	-
December 1994	Small Generator	Various Container Management Violation	-	Resolved	-
December 1994	Treatment Storage or Disposal Facility	Container Marking Violation	-	Resolved	-
December 1994	CE Exempt Generator	Failure to Characterize Waste	-	Resolved	-
December 1994	CE Exempt Generator	Unlawful Transportation	-	Unresolved	High
December 1994	Small Generator	Open Hazardous Waste Containers	-	Resolved	-
January 1995	Large Generator	Treatability Study Requirements	-	Resolved	-
January 1995	CE Exempt Generator	Unlawful Disposal	-	Resolved	High
February 1995	Small Generator	Failure to Maintain Registration	-	Resolved	-
March 1995	CE Exempt Generator	Failure to Characterize	-	Resolved	-
March 1995	Small Generator	Open Hazardous Waste Container	-	Resolved	-
April 1995	Treatment Storage or Disposal Facility	Financial Responsibility Violation	-	Resolved	-
April 1995	Treatment Storage or Disposal Facility	Financial Responsibility Violation	-	Resolved	-
May 1995	Used Oil Handler	Failure to Notify Re: Used Oil Marketing	-	Resolved	-
May 1995	Large Generator	No Generation Logs	-	Resolved	-
June 1995	Small Generator	Failure to Characterize Waste	-	Resolved	-
June 1995	CE Exempt Generator	Failure to Characterize	-	Resolved	-

**1995 Hazardous Waste Program Violation by Type and Status  
(October 1, 1994 - September 30, 1995)**

Issue Month	Handler Type	Violation Description	Penalty	Year End Status	High Priority Violator <sup>1</sup>
June 1995	Small Generator	Failure to Maintain Current Registration	-	Resolved	-
August 1995	Small Generator	Exceeded Accumulation Times	-	Resolved	-
September 1995	Large Generator	Exceeded Accumulation Times	-	Resolved	-

<sup>1</sup> A "high priority" violator is a handler who:

(1) has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or

(2) is a chronic or recalcitrant violator; or

(3) deviates from terms of a permit order or decree by not meeting the requirements in a timely manner and/or failing to perform work as required by terms of permits, orders, or decrees; or

(4) substantially deviates from the Resource Conservation and Recovery Act statutory or regulatory requirements.

**Discovery of Violations.** The program identifies and documents violations through on-site inspections and by review of records, reports, or other information submitted by handlers required by permit conditions, or requested by the program. Violations are documented in inspection reports and tracked in an electronic data management system.

The following table illustrates the method of violation discovery by handler types:

**DISCOVERY OF VIOLATIONS (1995)**

Handler Type	Total	Record Review	Self Reporting	Compliance Evaluation Inspection	Citizen Complaint
Treatment Storage or Disposal Facility	4	3	-	1	-
Large Generator	7	-	-	7	-
Small Generator	14	-	-	14	2
Conditionally Exempt	6	-	-	6	2
Used Oil	1	-	-	1	-
Transporter	1	-	-	1	-

source: Vidrine, 1996.

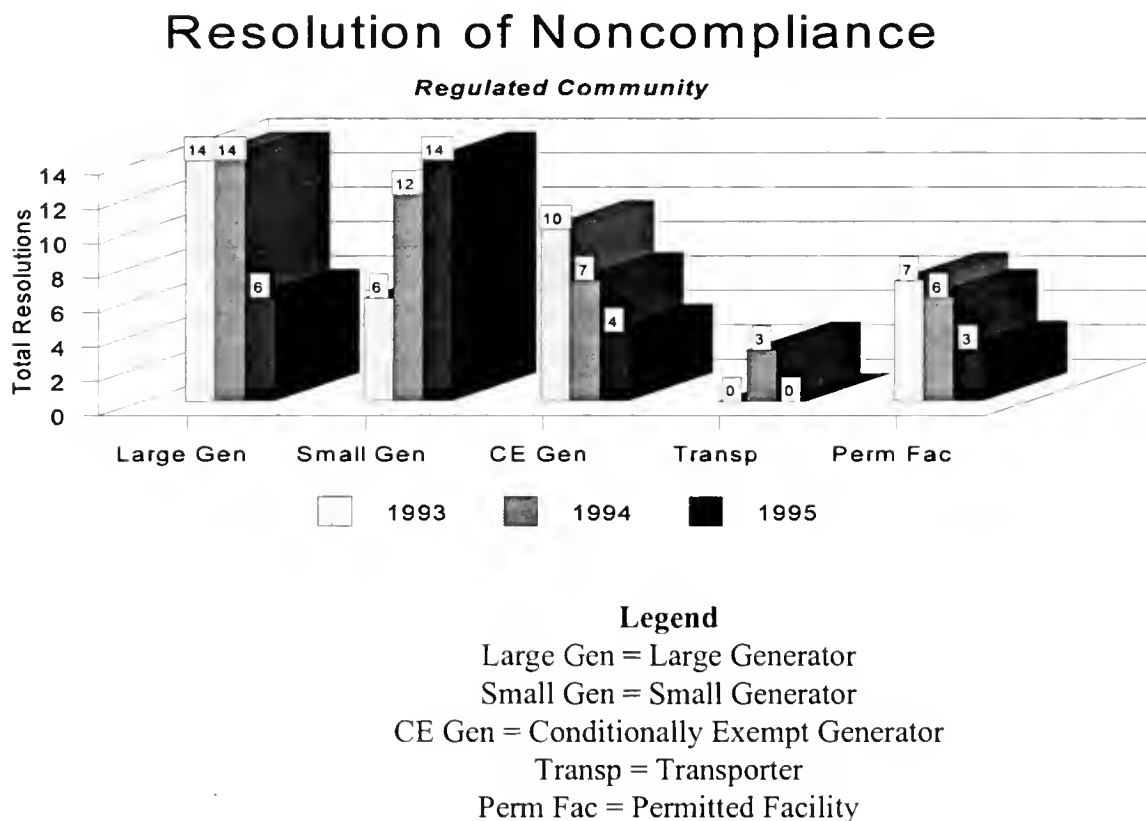
**10. Considerations in Calculating Penalties.** The Hazardous Waste Program has in place a penalty policy for calculating penalties. The penalty calculation system consists of 1) determining a gravity-based penalty for a particular violation from a penalty assessment matrix, 2) adding a "multi-day" component to account for a violation's duration, 3) adjusting the sum of the gravity-based and multi-day components up or down for case specific circumstances, and 4) adding to this amount the appropriate offset for economic benefit gained through non-compliance.

In administrative penalty cases, two separate calculations are performed: 1) to determine an appropriate amount to assess in the administrative order or other administrative action, and 2) to explain and document the process by which the department arrived at the penalty figure it has agreed to accept in settlement.

In civil judicial cases, the department will use the narrative penalty assessment criteria set forth in the policy to plead and argue for as high a penalty as the facts of a case justify, and will prepare a calculation which applies this policy to lay out the rationale behind any penalty amount the department agrees to accept in settlement. It is only at this time, after the complaint has been filed, that an adjustment for the violator's ability to pay may be considered.

**11. Resolution of Noncompliances.** The program seeks resolution of all noncompliance. An escalation of enforcement actions is initiated where previous actions have been unsuccessful in gaining a return to compliance. In some cases, litigation may extend several years before violations are resolved. Final resolution of violations is reached when the violator has demonstrated compliance with conditions specified in formal or informal administrative enforcement actions or with conditions prescribed by the court.

The following table illustrates resolution of noncompliance for segments of the regulated community:



source: Vidrine, 1996.

**12. Current Compliance Priorities.** Agency staff have identified the following FY 1996 priorities for the Hazardous Waste Program:

**Regulatory Unit:** Compliance evaluation inspections will be conducted at handler sites that contribute the most benefit to protecting public health and the environment. Criteria for selecting inspection candidates include, but are not limited to, length of time from previous inspection, likelihood for the handler to be in violation of regulatory requirements, compliance history, industry type, quantity and toxicity of hazardous waste generated, and site-specific environmental setting or other conditions which may increase the likelihood of adverse environmental or public health effects caused by improper management of hazardous waste.

Compliance evaluation inspections are planned for 100 percent of registered large generators, 50 percent of registered small generators, 10 percent of known conditionally exempt generators, a minimum of 90 non-notifiers, 50 percent of "for hire" hazardous waste transporters, and 100 percent of used oil collection centers, transporters, transfer facilities, and processors/re-refiners.

**Permitting Unit:** A minimum of one compliance evaluation inspection will be conducted at all facilities subject to permitting requirements. A post-closure care permit is scheduled to be issued to the Conoco Refinery. Major permit modifications are scheduled for Malmstrom Air Force Base, Exxon Refinery, and B.N. Paradise permitted facilities. The program will continue to lead corrective action activities at Transbas and will assume the lead from EPA at B.N. Paradise, Exxon Refinery, and Conoco Refinery contingent upon reaching established permitting milestones.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** The hazardous waste program has received authorization from the U.S. EPA. The EPA annually develops a RCRA Implementation Plan which identifies the national direction and priorities for implementing RCRA Subtitle C programs and which forms the basis for EPA and State workload negotiations for the upcoming year. The EPA conducts oversight of the state program to ensure that enforcement and other agreements are being complied with, work outputs specified in work plans is being performed by the program, and generally, that the state program is consistent with the federal program.

**Partnerships.** The Hazardous Waste Program partners with the Montana State University Pollution Prevention Program, when it is of mutual benefit, to provide businesses with information regarding waste reduction and regulatory requirements.

**Delegated Authority.** The Montana Hazardous Waste and Underground Storage Tank Act does not have provisions for the delegation of the department's authorities.

# Underground Storage Tank Release Prevention Program

The Underground Storage Tank Release Prevention Program regulates the underground storage of petroleum products and hazardous chemicals. The program also permits the installation, closure, repair and modification of new and existing underground storage tank systems and it licenses individuals who engage in the business of installing, closing, repairing and modifying underground storage tanks and piping. Through compliance assistance efforts and regulatory oversight, the program seeks to prevent the accidental release of petroleum and hazardous chemicals into ground water and the environment.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Underground Storage Tank Release Prevention Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Montana Constitution, Art. II Section 3 and Art. IX Section 1**
  1. Constitutional goals: Maintain and improve a clean and healthful environment for present and future generations.
- **Montana Hazardous Waste and Underground Storage Tank Act** MCA Sec 75-10-401 et.seq.
- **Montana Underground Storage Tank Installer and Licensing and Permitting Act** MCA Sec 75-11-201 et.seq.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et. seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)
- **Clean Air Act of Montana** (MCA 75-2-101, et. seq.)

Related federal authorities:

- **Resource Conservation and Recovery Act (RCRA) Subtitle 1**
- **RCRA section 9003 (h)**

Underground Storage Tank Rules:

- ARM 16.45.101-1240

Specific enforcement authority:

- **Montana Hazardous Waste and Underground Storage Tank Act:**
  - a. Administrative Rules: §75-10-405(2)(c);
  - b. Administrative Enforcement: §75-10-413;
  - c. Injunctive Relief: §75-10-414;
  - d. Civil Penalties: §75-10-417;
  - e. Administrative Penalties: §75-10-423.
- **Montana Underground Storage Tank Installer Licensing and Permitting Act:**
  - a. Administrative Rules: §75-11-204;
  - b. Administrative Enforcement: §75-11-218;
  - c. Injunctive Relief: §75-11-219;
  - d. Civil Penalties: §75-11-223;
  - e. Criminal Penalties: §75-11-224.
- **Primary and jurisdictional agreements:**
  - a. State program approval and primacy from federal EPA.
  - b. State program\Assiniboine Sioux cooperative agreement.
  - c. State\EPA Cooperative Enforcement Agreement.
  - d. State program inspection contracts with 32 local government units.

**2. Program Goals.** Based on the above-referenced guidance, the Underground Storage Tank Release Prevention Program has identified the following program goals:

1. To establish, administer, and enforce an underground storage tank leak prevention program for petroleum products and hazardous chemicals;
2. To remedy violations of underground storage tank requirements established under the Montana Hazardous Waste and Underground Storage Tank Act [§§75-10-401, et.seq., MCA];
3. To establish, administer, and enforce an underground storage tank installer\remover and inspector program through permitting, licensing and/or certification, and inspections.
4. To remedy violations of underground storage tank requirements established under the Montana Underground Storage Tank Installer Licensing and Permitting Act [§§75-11-201, et.seq., MCA].



**3. Program Activities.** In general, the Underground Storage Tank Release Prevention Program (USTRP) seeks to regulate the installation, removal, and management of underground storage tanks used to store liquid petroleum products and hazardous chemicals such that releases are 1) prevented and/or 2) detected quickly, thereby protecting public health, safety, and the environment.

These activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg. Years Staff Retntn</u>	<u>1995 Program Projects</u>	<u>Activities</u>
Administration	\$106,700	1.26	5.4 yrs	<sup>1</sup>	
Program Support	126,706	3.10	2.5 yrs	<sup>2</sup>	
Permitting/licensing	146,712	2.5	2.25 yrs	999 permits <sup>3</sup> 280 licenses	
Compliance/ Enforcement <sup>4</sup>	286,755	5.0 <sup>5</sup>	1.83 yrs	354 inspections	
sub total	\$666,873				
Local Govt... grants	\$126,000			32 local governmental units	349 inspections <sup>6</sup>
<b>TOTAL</b>	<b>\$792,873</b>	<b>11.86 auth.</b>			

<sup>1</sup> Includes program management and pro-rated portion of division administration costs.

<sup>2</sup> Includes clerical and database support activities.

<sup>3</sup> Activities include preparation and review of environmental assessment for permitted projects.

<sup>4</sup> 2.0 FTEs assigned to permitting and licensing also have regulatory/compliance responsibilities.

<sup>5</sup> Includes 0.5 FTE attorney.

<sup>6</sup> Includes 276 compliance inspections and 73 installation/closure inspections.

source: Gessaman, 1996.

**Fees and Charges.** The Underground Storage Tank Release Prevention Program revenues from fees and charges are described below. Maximum tank notification and permit fees are set by statute. Installer licensing and tank installation permitting fees are set by rule. The USTRP Program derives approximately 76% of its funding from state special revenues. It also receives a federal EPA grant. The EPA UST Release Prevention Program grant for FY 96 totals \$141,474. The federal grant requires a 25% state dollar match totalling \$47,158 for FY 96. The state matching funds are from the Hazardous Waste/CERCLA Account [RIGWAT (RIT) Interest]. The program receives no General Fund monies.

<b>TOTAL FY 95 Fee Revenues:</b>		<b>\$452, 671</b>	
<u>Type</u>	<u>Authorized Amount</u>	<u>Total</u>	<u>Uses</u>
Tank Registration Fees	\$20/yr. ≤ 1,100 gallons \$50/yr. > 1,100 gallons	\$350,760 <sup>1</sup>	UST Program/ local governments UST Program
Installer Licensing Fees	\$100 - Application & Exam Fee \$50 - Renewal Fee \$10 Duplicate License Fee	<sup>2</sup>	
Permit Review & Installation Inspection Fees	Varied	\$99,411 <sup>3</sup>	
Noncompliance Penalties:	varied	\$2,500	General Fund

<sup>1</sup> FY 95 tank registration fee collections

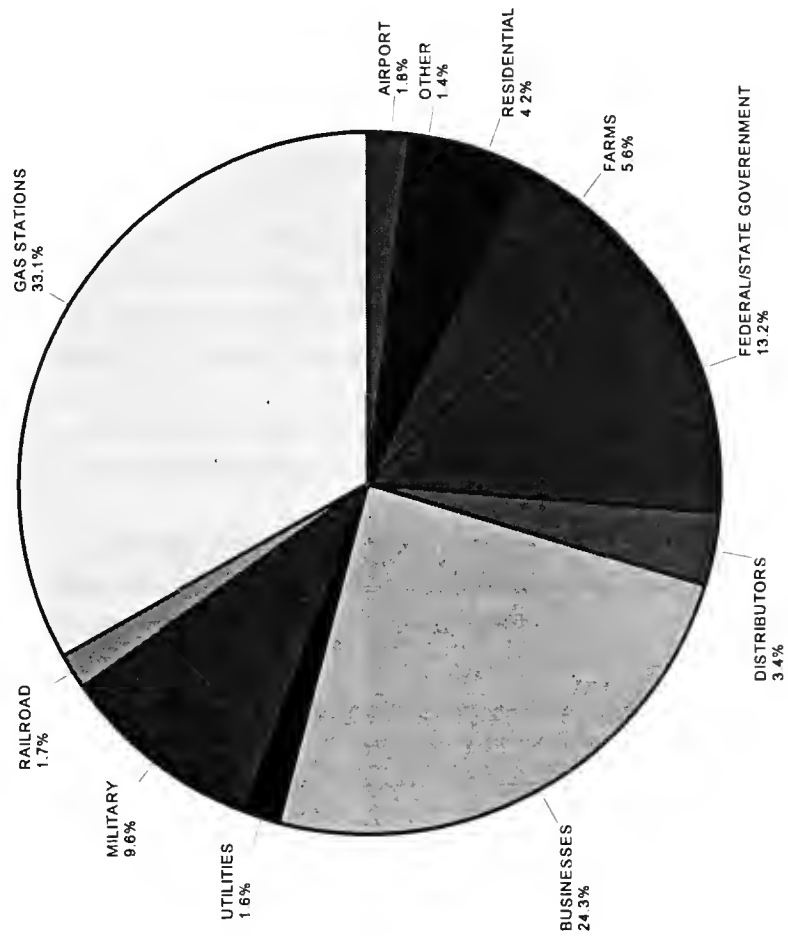
<sup>2</sup> FY 95 license fees estimated at \$14,000. The UST Program does not maintain separate reporting centers for the accounting of licensing and permitting fee collections.

<sup>3</sup> Combined FY 95 permit and license fees.

source: Gessaman, 1996.

**4. Regulated Communities.** Consistent with the activities noted above, the program interacts with a variety of regulated communities. The regulated community for the UST Release Prevention Program includes any "person", as defined in §75-1-403(12), MCA, who owns or operates an underground storage tank system, is a licensed tank installer, is a licensed tank inspector, does tank or line testing, or anyone who deposits regulated substances in an underground storage tank system. The universe of tank owners and operators consists of federal, state and local government agencies, schools, hospitals, railroads, service stations, utilities, convenience stores, farms and other industrial and commercial enterprises that have either petroleum or chemical storage tanks. The current regulated community of underground tank owners/locations is shown on the next page.

## ACTIVE TANK OWNERSHIP BY FACILITY



**5. Philosophical Approach to Compliance.** Because of the nature and size of the regulated community, DEQ is focusing its enforcement efforts on encouraging voluntary compliance. According to program staff, there are currently about 7,000 active USTs in use which are located at approximately 2,700 facilities.

One of the primary assumptions used in the formulation of the program's enforcement strategy is that adequate compliance can be achieved by providing information and technical assistance to owners/operators in order to prevent violations from occurring.

During the past four years, the program has invested a major portion of its program resources to fund activities designed to educate the regulated community about compliance issues. An intensive effort has been made to provide technical assistance to the regulated community. These activities have been in the form of statewide "town meetings," speaking engagements at trade conferences, training workshops, the provision of informational mailings and brochures, and news releases.

Exit interviews are conducted at the conclusion of each field inspection. These sessions provide an opportunity for tank owners/operators to ask questions and seek technical and compliance assistance.

**6. Compliance Tools Available and Used.** The program's formal inspection and enforcement procedures are documented in the *Underground Storage Tank Enforcement Procedures Guidance Manual*, in place since 1991. The program has a number of "enforcement tools" which are used to encourage and obtain compliance. The program's enforcement goal is to achieve the highest level of compliance possible with the smallest expenditure of limited formal enforcement resources. To achieve this goal, the program utilizes an escalating enforcement strategy. The "enforcement tools" which are used range from informal to formal enforcement activities.

Because of the size and nature of the regulated community, the program is focusing its primary enforcement efforts on encouraging voluntary compliance through the following enforcement activities:

**Informal enforcement activities**

- Inspection exit conferences, checklists
- Written inspection reports - findings and recommendations
- Warning letters
- Informal notices of violations
- Compliance plans and schedules
- Follow-up meetings, phone calls
- Follow-up inspections

The following stricter, more resource-intensive formal enforcement activities are taken when efforts to gain voluntary compliance through informal enforcement efforts have been unsuccessful:

#### Formal enforcement activities

##### Administrative remedies

- Formal Notices of Violation;
- Administrative Orders;
- License revocation

##### Judicial remedies

- Civil actions (court ordered corrections, penalties)
- Injunctions
- Criminal sanctions (fines/penalties, imprisonment)

The program has statutory authority (§75-10-423, MCA) to utilize administrative penalties. The agency has prepared, but not yet adopted, administrative rules which will implement an expedited administrative penalty program.

The menu of tools used by the program is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with the Underground Storage Tank Release Prevention Program rules and regulations are:

#### **Agency-Generated.**

- 1) Tank-owner eligibility for financial responsibility and corrective action cost reimbursement if found to be in compliance with tank management and release prevention requirements.
- 2) Loss or threat of loss of tank installer/remover licensure.
- 3) Federally imposed deadlines for UST replacement and upgrading.
- 4) Inability to obtain fuels/chemical delivery unless tank is notified to and tagged by the program.

#### **Industry-Generated.**

- 1) Property valued as an asset or liability depending on status of facility upgrade.
- 2) Peer pressure.
- 3) Real estate transfers/fiduciary concerns.

#### **Other.**

- 1) Threat of financial ruin and 3rd party suits from undetected releases causing catastrophic impacts to ground water or adjoining properties.
- 2) Danger of fire or explosion from vapor migration.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- UNDERGROUND STORAGE TANK RELEASE PREVENTION

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/T.A.: Program Info on NRIS (Natural Resource Information System)	The USTRP does not have its information on the NRIS database; however the UST corrective action program, which is closely related, is compiling soil and groundwater information from throughout the state as a result of its subsurface investigations. The NRIS system at the State Library is 1) a computerized inventory of natural resource data, and 2) a network for accessing existing public computerized data banks throughout government. The USTRP Program does not have the capability to present tank data so it can be used by NRIS, but is seeking funding for ground positioning system (GPS) equipment to gather the needed data. The USTRP program has use of the UST corrective action program soil and groundwater information when it is permitting UST installations, removals and upgrades (leak detection monitoring, cathodic protection retrofits, etc). The USTRP program does have its own database describing the locations of 23,463 USTs in Montana, many of which have been closed or removed as a result of this program.	staff	NA
On-site Technical Assistance -Local Government Training	The USTRP program has contracts with 32 local government agencies (local health, fire departments, and rural fire districts) to assist with on site field inspections of UST facilities on an as-needed basis. Local governments are reimbursed for their efforts and their staff is trained by the USTRP program.	staff	32
-State Efforts	The USTRP program has 7 FTEs assigned to compliance, regulatory and permitting efforts. Inspections are ad hoc, complaint, or tank activity driven.	staff	356
Technical Seminars	Town meetings, trade conferences, and training workshops are offered or attended regularly.	staff	2
Brochures, 1-800 toll free number, inspection exit conferences, newsletters, annual mailings	Routine and annual mailings to UST owners and licensed installers provide compliance information, upcoming deadlines, and provide agency toll free phone numbers to the public. Inspection exit interviews with UST owners provide rules compliance information.	staff	NA
Comprehensive Planning/Withdrawals: -"Unsuitable" Lands	Not authorized	NA	NA

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- UNDERGROUND STORAGE TANK RELEASE PREVENTION

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Permits\Certification\Bonds -Tank Installers\Removers License	Good for 3 years, applicants must pass examination and have proof of experience to obtain license. License must be renewed annually and reissued every third year. Licensees must demonstrate continuing competency through continuing education or via examination prior to having their license reissued. License is required to install\remove USTs or to repair or upgrade an UST system. UST owners or operators may install\remove\repair their own systems without being licensed, provided they obtain a permit (below) and have the installation inspected.	UST Pro-gram tests	280
-UST installation or removal permit	Required to perform work on an UST; removal, installation, or upgrading.	UST staff	999
-Tank Inspectors license	Required for local governments to contract with state and receive 80% of UST installation\removal permit fees to cover costs of on-site inspections.	UST Pro-gram tests	62
-Tank Registration permit	\$20 maximum annually for USTs < 1100 gallons capacity; \$50 max. annually for larger tanks. Tags and certificates are issued for notified\paid tanks. Tanks without tags cannot be filled with product.	staff	7000 active USTs
-Certification\Bonds	Not authorized	NA	NA

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- UNDERGROUND STORAGE TANK RELEASE PREVENTION

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> -Informal -Formal monitoring reports -Compliance inspections -Self Certification -Sampling Inspections	Performed continuously ad hoc as compliance assistance\information effort Not required. USTRP program leak detection rules are self implementing and are the responsibility of the owner to implement and keep records of the results. Ad hoc as time allows, complaint driven and activity related (installations, removals, etc) Currently under development by the agency to allow the regulated community to certify compliance and thereby prioritize agency inspection efforts. Authorizes agency to enter and inspect at reasonable hours upon presentation of credentials to sample materials, wastes, soil, water, or copy records etc, if agency believes there is non-compliance or in order to enforce law, rules or order.	staff staff staff  staff	  356  2



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- UNDERGROUND STORAGE TANK RELEASE PREVENTION

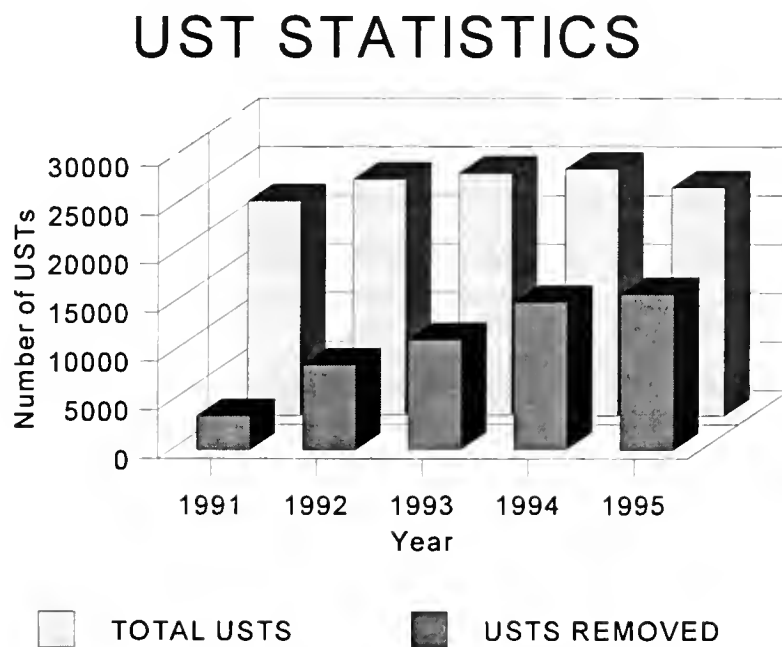
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Administrative Notices/Orders:</b> Notice of Violation -Warning Letter -Informal within 30 days of discovery -Formal within 90 days of discovery Administrative Orders Cleanup Orders	<p>Issued for first time offenders or when minor violation is noted and compliance is anticipated\expected.</p> <p>Issued for violations requiring corrective action by date certain, with warnings of follow-up enforcement responses and requesting submission of certificate of compliance. Copies of NOV are submitted to the Petroleum Tank Release Compensation Board.</p> <p>Issued with formal citations and requests for compliance plans\schedules for potentially serious violations which may not be promptly corrected.</p> <p>May be issued for alleged violations of law rule or permit. Becomes effective in 30 days unless recipient requests a hearing before the Board of Environmental Review.</p> <p>Issued upon evidence of spill, discharge, etc. resulting in unlawful disposal.</p>	<p>staff</p> <p>staff</p> <p>Director; UST legal counsel</p> <p>Director</p> <p>Director</p>	<p>47</p> <p>39</p> <p>0</p> <p>0</p> <p>NA</p>

STATE COMPLIANCE/ENFORCEMENT TOOLS -- UNDERGROUND STORAGE TANK RELEASE PREVENTION			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Administrative Penalties/Sanctions: Notice of Violation/Proposed Penalty (NOVPP)	Authorized under MCA 75-10-423 for UST violations only; does not apply to UST installer/remover law. Maximum penalty \$500/violation.	not yet implemented	-
Opportunity for Conference/Hearing	To contest alleged violation or to request mitigation of penalty. Hearing conducted as a contested case under the provisions of the Mont. Administrative Procedures Act (MAPA).		0
NOVPP Modification - Penalty Waiver	Established through matrix adopted by pending rule allowing for gravity of violation, harm, and corrective action taken.	see above	-
License Revocation	UST Installers and Removers licenses can be denied, modified, revoked, conditioned or suspended for fraud, non-payment of fees, failing test examination, having been licensed and revoked in other states, or violations of law, rule, permit, or order relative to UST installation of closure.	Director	2
-Hearing	Hearings on license actions may be requested before the Board of Env. Review in accordance with MAPA provisions.	Director	0
Civil Judicial Action:	For violations of UST law, rules, orders of agency or the Board of Environmental Review. Maximum \$10,000/violation/day.	Director	6
Injunctions	To require compliance with law, rule, order, or permit; to immediately restrain unauthorized activity endangering public health or environment; to avoid imminent hazard endangering public health or environment.	Director	0
Criminal Judicial Action:	Criminal penalties apply <u>only</u> to the UST installers/removers law (Sec 75-11-201 et. seq.). They apply to willful violations, knowingly making false statements, installing or removing USTs without permits or without a license. Maximum \$10,000 and/or 6 months for the 1st offense. Maximum \$20,000 and/or 1 year for subsequent violations.	Director	0

**History of Compliance.** Trends in compliance with USTRP rules and requirements are illustrated below. The USTRP Program implemented minimal federal EPA requirements for tank notification and interim new tank standards in 1986. Federal and state program operational rules were developed in 1988 and 1989 respectively. The program's early compliance efforts focused on educational and compliance assistance efforts. According to staff, the program has only recently instituted a more active enforcement effort.

The primary goal of both the federal and state UST Programs is to prevent releases from underground storage tanks and piping. One of the major causes of releases is that unprotected steel tanks and piping corrode and release product through corrosion holes. Most of the UST systems installed prior to 1986 were constructed of bare steel tanks and piping. To address this problem, federal and state tank regulations require USTs installed before December 1988 to have corrosion protection by December 1998. Owners and operators have the options of either adding corrosion protection to existing bare steel tanks and piping or removing the substandard tanks and piping before December 1998.

The following graph shows Montana's compliance effort in meeting the 1998 deadline that requires operating USTs to be protected from corrosion. To date, owners and operators of about 15,000 substandard USTs have chosen to permanently close their tank systems rather than upgrade them with corrosion protection and overfill/spill equipment. The early closure of these tank systems has prevented many leaks that could have occurred between now and December 1998.



Note: As of April 27, 1995, Montana's total UST population decreased from 25,954 to 23,463 underground storage tank systems. SB 386 (1995 Legislative Session) removed 2,491 small farm and residential tank systems from regulation as underground storage tank systems.

Approximately 2,000+ tanks of the state's active tank systems have either been upgraded with corrosion protection and overfill/spill containment equipment or replaced with either new fiberglass, composite, or cathodically-protected steel tanks and piping.

**9. "Violations."** The UST Release Prevention Program has no written policy establishing a hierarchy of violations. As standard operating procedure, the program has determined that the following violations are most serious because these deficiencies are most often responsible for releases occurring and they exacerbate the severity of the release.

- Failure to promptly report a release.
- Failure to install a properly designed underground storage tank system.
- Failure to properly and routinely conduct release detection.
- Failure to notify the existence of an underground storage tank system.
- Failure to equip pressurized product piping with appropriate release detection equipment.

A violation is deemed "significant" if the deficiencies are determined to be serious enough to require further follow up action, such as a re-inspection, a warning letter or other informal enforcement action. Such violations generally involve release detection, notification, improper installation and/or closure deficiencies because the failure to be in compliance with these requirements increase the potential that a release will not be prevented or will not be promptly detected.

During FY 1995, the program conducted 356 compliance inspections, 133 tank installation/closure inspections, and initiated 86 informal enforcement actions (warning letters and Notices of Violation) and 8 formal enforcement actions (administrative orders and civil complaints). There were more than 400 violations noted, over half for failure to comply with product delivery line leak detection requirements.

During 1995 the Underground Storage Tank Program took formal enforcement actions for violations shown below:

<b>1995 USTRP Violations Resulting in Formal Enforcement, by Type and Status</b>						
<b>Month Issued</b>	<b>Type of Action</b>	<b>Type of Operator</b>	<b>Description of Violation</b>	<b>Penalty Assessed</b>	<b>Status at Year End</b>	<b>Significant Violation</b>
March	Civil	Tank Owner	Leak detect. deficiencies, waived temp. closure violation.		active	yes
May	Civil	Tank Owner	Failure to do site assessment.		active	yes
May	Civil	Tank Owner	Failure to do site assessment.	\$500	closed	yes
May	Civil	Tank Owner	Leak detect. violation.	\$2,000	active	yes
June	Admin. Order	Licensed Installer	Failure to conduct closure in accordance with dept rules.		closed	yes
July	Civil	Tank Owner	Failure to promptly report a release, leak detect. deficiencies.		dismissed	yes
July	Civil	Tank Tester	Failure to promptly report a release.		dismissed	yes
August	Admin. Order	Licensed Installer	Failure to conduct installation in accordance with dept rules.		active	yes

source: Gessaman, 1996.

**Discovery of Violations.** Most program violations are discovered and documented during field inspections and complaint investigations. Checklists and inspection and investigation reports are used to document violations. The UST installation and closure permitting process provides another opportunity for deficiencies to be identified and remedied. Permitting program staff work with owners and operators

when deficiencies are found in a proposed installation project. The program also maintains a computer database through which violations can be tracked and corrections can be monitored. Program staff and management can utilize information in the database to review individual violations or to generate statistics about violations.

Group	Total	Violations Discovered, by method, 1995			
		Agency Review of Monitoring Reports	Self-Reporting of Violation	Inspection	Citizen Complaint
UST owners	400	0	NA	400	0 <sup>1</sup>
UST installers/removers	3	0	NA	2	1 <sup>2</sup>

<sup>1</sup> During FY 95, the program received 2 complaints concerning tank operations, DEQ's investigations of the complaints found no violations of the underground storage tank regulations.

<sup>2</sup> During FY 95, the program received 3 complaints concerning tank installer activities.

The following chart provides a summary of violations noted by the program during 1994 and 1995. The compliance/enforcement response to these violations was typically begun with informal enforcement actions, (e.g., warning letters, notices of violation) escalating to the use of formal enforcement actions, administrative orders or civil complaint, as the case progressed.

Summary of Violations Observed by Category		
Violation category	Number of Violations by Fiscal Year	
	1994	1995
Failure to notify a tank's existence	15	12
Failure to properly close an out-of use tank	14	67
Failure to provide automatic line leak detection	94	120
Failure to conduct line tightness testing	67	108
Failure to do monthly inventory control	32	47
Failure to conduct annual tank tightness tests (if required)	11	46

source: Gessaman, 1996.

**10. Considerations in Calculating Penalties.** The program's enforcement policy contains a penalty calculation matrix which factors background, environmental, economic benefit, gravity-based, and violator-specific components into the determination of a target penalty. The program has a written *Enforcement Procedures Guidance Manual* developed as part of its EPA grant obligations which provides guidance for penalty calculations. The program's enforcement guidance provides for consideration of the frequency of violations in selecting an appropriate enforcement response. Frequent or continuing violations warrant an increased level of enforcement response. The program uses a formalized UST Enforcement Priority Ranking Schedule and form utilizing a point system to rank facilities for enforcement action. The ranking form is used to objectively evaluate violators for referral for judicial enforcement. The type of enforcement response selected depends on the seriousness of the violation, (i.e., actual or possible harm, importance to the regulatory program, availability of data about the violation, etc.) other circumstances of the violation (i.e., culpability) and information about the owner, (i.e., economic benefit of noncompliance, the facility's compliance history, the owner's ability to

pay and the size of the business).

**11. Resolution of Noncompliances.** As previously mentioned, the formal enforcement component of the program has only been implemented recently, following years of program development and significant efforts at compliance education for a rather large and previously unregulated community. The recently authorized administrative civil penalty provision rules have not yet been adopted by the agency. Formal enforcement actions are usually needed to deal with noncompliant violators.

The department's director is ultimately responsible for the program's enforcement activity. Current department policy requires that the director authorize each formal enforcement action before it is referred to the Legal Unit. Standard operating policy requires that initial compliance efforts be taken through informal enforcement activities. In most instances, formal enforcement efforts are pursued only after informal enforcement efforts have proven unsuccessful in obtaining compliance.

When formal enforcement activities become necessary, such action is initiated by program specialists (inspectors). The process is initiated by completing and forwarding a Request for Enforcement Action/Activity to the program manager. If the program manager concurs with the specialist's recommendation, the request is forwarded through the division administrator to the director's office. If the director signs the request, it is referred to the program attorney for implementation. The program attorney and the enforcement coordinator are responsible for seeing that the action is brought to conclusion. The program has the services of 0.5 FTE attorney.

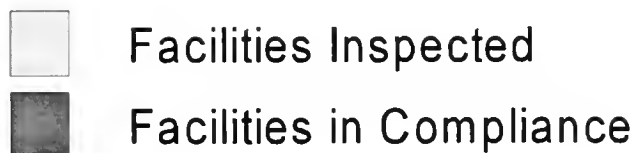
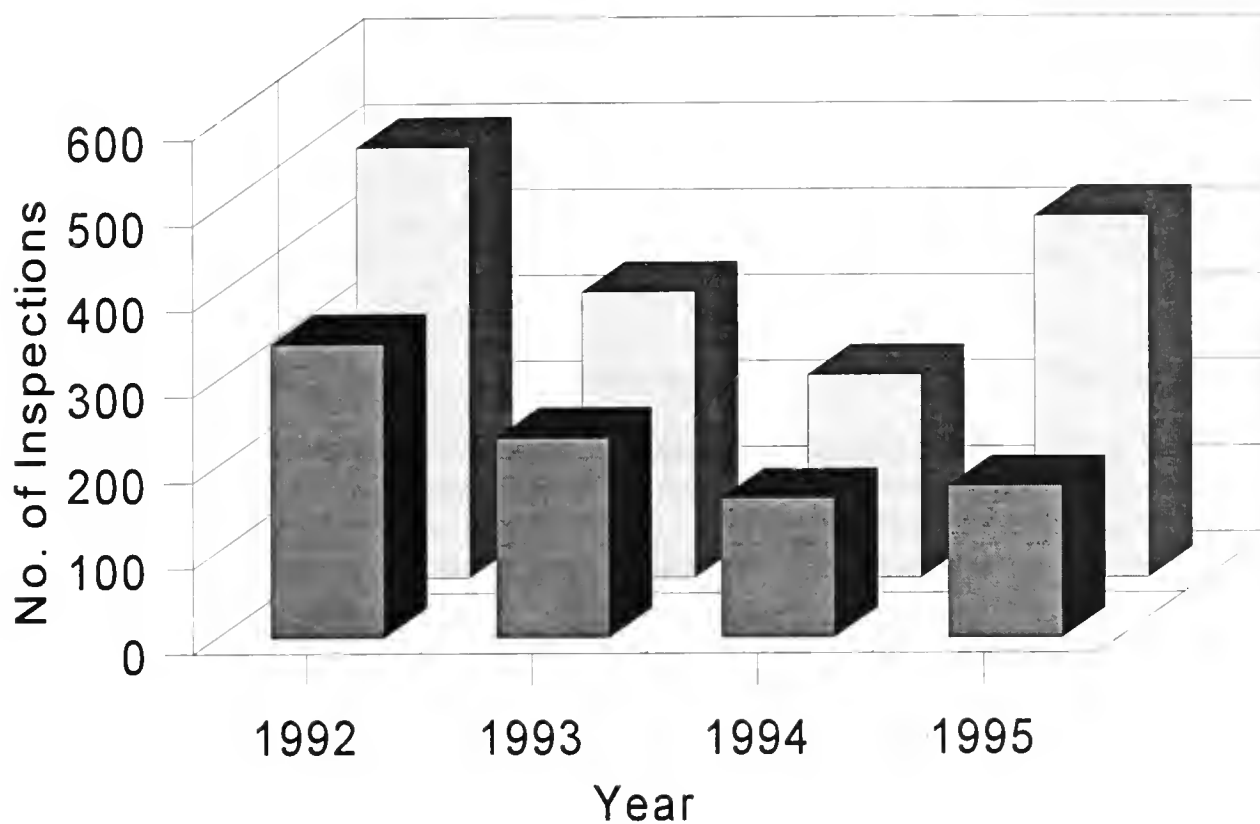
Shown below is a chart detailing the various compliance/enforcement actions taken by the program during FY 1993, FY 1994 and FY 1995.

Summary of Formal Enforcement Actions			
Activities by Fiscal Year	1993	1994	1995
Compliance Inspections	440	319	356
Informal Enforcement Activities (informal NOV's only)	43	37	39
Formal Enforcement Activities (Administrative Orders and Civil Complaints)	1	1	8
Installer Licenses Conditioned	0	1	0
Installer Licenses Revoked	1	1	0

The graph below shows the rate of "significant compliance" for UST facilities as determined by on-site inspections completed during calendar years 1992, 1993, 1994, and 1995. The data was gathered from program statistics reports prepared to satisfy federal grant reporting requirements.

(NOTE: The data used to generate the graph is not the same as that shown in the table above. First, the graph reports data for **calendar years**; the table reports data for **state fiscal years**. Second, the graph does not include statistics about the number of re-inspections completed or the number of inspections that were conducted on tanks and piping not regulated by federal law.)

## UST COMPLIANCE HISTORY



**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Underground Storage Tank Release Prevention compliance and enforcement program.

- Inspect all facilities with underground pressurized piping, especially underground piping attached to aboveground tanks.
- Inspect all new UST installations.
- Develop and implement a "self-certification" program.
- Provide more field presence and greater visibility of enforcement activities.
- Solicit more involvement from the regulated community, public, and other stakeholders in the development, review and implementation of the program's regulatory effort.
- Make more effective use of the product delivery network.
- Encourage the development of a financial assistance program which will provide funding for upgrades of existing facilities and the cleanup of abandoned tank sites.

Agency staff have identified the following short term priority needs for the USTRP Program:

- Adopt rules to implement administrative penalty provisions.
- Develop a draft program enforcement strategy matrix.
- Create a "tank advisory group" composed of tank owners, stakeholders and the public.
- Study the development of a tank operating permit system.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** Montana has received federal program approval from the Environmental Protection Agency. This means that the Department of Environmental Quality has primacy for the regulation of the underground storage of regulated substances in the State of Montana, except within the boundaries of the state's seven Indian reservations. Although program approval has been granted, EPA will maintain an oversight role to insure that Montana's program operates in a manner which is at least equivalent to federal standards and requirements. The receipt of federal UST Program Assistance Grant monies also creates quarterly and annual reporting requirements.

Unlike other federal Resource Conservation and Recovery Act (RCRA) Programs, EPA developed the underground storage tank program to be a "franchise" program. In developing the "franchise" concept, EPA envisioned that its role would be to assist in the development and support of viable state programs which would totally supplant the federal UST program.

EPA estimates that the Office of Underground Storage Tanks will cease operation in 2001. Regional EPA offices will pick up some the national office's duties and responsibilities at that time and continue to provide limited support to state programs. Federal grant oversight requirements require that the EPA state project office must conduct mid-year and year-end reviews of the program's activities. The state program has negotiated a Cooperative Enforcement Agreement with the U.S. EPA. Compliance/enforcement activities are reviewed in relation to the annual workplan which is developed as part of the State/EPA Agreement. Records of such activities must be provided for EPA review.

**Partnerships.** The Underground Storage Tank Release Prevention Program has entered into a Cooperative Agreement with the Assiniboine and Sioux Tribes to jointly regulate underground storage tanks on the Fort Peck Indian Reservation.



In an attempt to resolve overlapping regulatory issues involving underground piping connected to aboveground tanks, the UST Program has recently contacted the state fire marshal about the formulation of a Memorandum of Understanding (MOU) to delineate enforcement roles and responsibilities.

**Delegated Authority.** The program has delegated inspection authority to local government units where possible. The State/EPA cooperative agreement provides for this, as does state law. The program utilizes the services of personnel employed by willing local health departments, fire departments and rural fire districts. The program currently has contracts with 32 local governmental agencies. These agencies conduct compliance inspections, disseminate information, and complete tank closure inspections. Individuals who carry out these duties are licensed as inspectors by the state program. The UST program is authorized to reimburse local government units for their work on behalf of the program. Reimbursement funds are generated from UST permit fees.

During FY 1995, local government inspectors conducted 276 out of the total 356 compliance inspections and 73 of the installation/closure inspections.

## WATER QUALITY DIVISION

The Water Quality Division is responsible for the protection of public health and the environmental quality of Montana's water resources. The program administers the Montana Water Quality Act, Montana laws regarding public water supply, the Sanitation in Subdivision Act, the Water/Wastewater Operator Certification law, and numerous rules promulgated to implement these laws. The division has seven active programs responsible for the implementation of its statutes and rules, 6 of which are covered in this report. The seventh section, "Enforcement," is not addressed separately, but, instead, enforcement activities are reflected as a part of each section's responsibilities.

### Funding Sources, FY 96

<u>Program/Activity</u>	<u>General Fund</u>	<u>State Special/ Fees</u>	<u>Federal</u>	<u>Total Funds</u>	<u>FTE</u>
Water Quality Management	None	\$298,100	\$1,118,800	\$1,416,900	11.2
Pollution Control	None	85,400	489,600	575,000	8.3
Water Permits	None	483,800	30,000	513,800	9.6
State Revolving Fund	None	63,100	668,400	731,500	10.3
Ground Water	None	240,020	169,500	409,500	7.6
Drinking Water/ Subdivisions	None	1,363,300	793,300	2,156,600	29.3
Misc/Cost-Share	None	141,600	0	141,600	NA
<b>TOTAL (FY 96)</b>	<b>0</b>	<b>\$2,675,300</b>	<b>\$3,269,600</b>	<b>\$5,945,000<sup>1</sup></b>	<b>76.3</b>
<b>TOTAL (FY 90)</b>					

**Notes:**

- 1 Does not include \$1,541,200 of ear-marked dollars to be passed through to conservation districts for non-point-source-related efforts.

source: LFA, 1995, 1989.

## Legislative History

Events important to the compliance/enforcement elements of the Water Quality Program are summarized below.

- 1907 First water quality law passed in response to typhoid outbreaks in the Milk River; law required treatment of all sewage discharged into water used for public water supply or ice-making.
- 1955 First comprehensive state water pollution control law was passed to protect all beneficial uses.
- 1956 Congress passes the Federal Water Pollution Control Act.
- 1968 Wastewater Discharge Program initiated; permit requirements were simple and designed to protect aesthetics and water quality.
- 1972 Congress passes major amendments to the Federal Water Pollution Control Act, creating the Federal Clean Water Act. The law included provisions for a National Pollutant Discharge Elimination System NPDES, to control point source discharges.

- 1974 Federal government first regulates drinking water through passage of the Safe Drinking Water Act; State of Montana receives delegation of NPDES program, through EPA, and calls it the Montana Pollutant Discharge Elimination System (MPDES) program.
- 1978 Montana assumes primacy for federal Safe Drinking Water Act
- 1986 Federal government requires EPA to promulgate a series of new regulations for Montana water suppliers; since then, EPA has promulgated 7 or 8 new rule packages related to public water suppliers, each almost a separate program unto itself. With primacy, the state has the responsibility to implement those rules.
- 1987 Water Quality Division establishes internal enforcement program. This was the first specific enforcement program in a state administrative agency.
- 1992 Federal regulations promulgated for nonpoint source discharges.
- 1995 Enforcement and Compliance Manual adopted by DEQ; Trailer Court and Campgrounds Law (related to drinking water) authority moved to Department of Public Health and Human Services

The mission of the Water Quality Division is to protect, sustain, and improve a clean and healthful environment to benefit present and future generations. The division's first priority is keeping the regulated community in compliance with all the applicable statutes and rules.

A written enforcement manual, adopted in August 1995, ensures systematic and predictable enforcement decisions. Field investigations are crucial for an adequate program and quite often, informal discussion with a member of the regulated community is sufficient to ensure compliance. If informal approaches do not work, formal enforcement actions are taken. Formal enforcement actions, detailed in the Manual, range from written notices of noncompliance to judicially imposed penalties or criminal sanctions. The division may also refer a violation to the federal Environmental Protection Agency. Over the past 20 years, \$650,000 has been assessed and collected in penalties for water quality violations and \$100,000 in agency expenses has been recovered. When required, the penalties sought must equal the cost savings resulting from noncompliance. This removes any economic advantage for noncompliance. The division defines success in terms of decreased violations and improved compliance.

Immediate goals for the division include developing and implementing an improved violation tracking system, ensuring that the statutes and rules are written clearly and concisely so to be easily understood by the regulated community, and improving the division's education and technical assistance capabilities.

# Public Water Supply Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Public Water Supply Program. Due to the nature of the program's operations, this summary includes information on the following specific programs: Public Water Supply Act; Sanitation in Subdivisions; and Water and Wastewater Operator Certification.

Where appropriate, information on specific programs is highlighted under general headings.

Primary constitutional and statutory authorities (see Appendix B):

- **Article II, section 3** - "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . ."
- **75-5-101, MCA. Water Quality Act** policy statement. "It is the public policy of this state to conserve water by protecting , maintaining, and improving the quality and potability of water."
- **75-6-101, MCA. Public Water Supply Act** policy statement. Similar to above.
- **37-42-101, MCA. Water and Wastewater Operator Certification** purpose section. "The health and welfare of Montana citizens and Montana's state water are jeopardized by persons not properly qualified to operate water supply systems and wastewater treatment plants."
- **76-4-101, MCA. Sanitation in Subdivisions** policy statement. "It is public policy to extend laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems."

Supplemental and/or related state authorities:

- None

Related federal authorities:

- **Clean Water Act**
- **Safe Drinking Water Act**

Specific enforcement authority:

General:

- 75-5-601, MCA et seq

PWSA:

- 75-6-109 through 114, MCA

Subdivisions:

- 76-4-1241 through 76-4-1251, MCA

Water Treatment Plant Operators:

- 37-42-321, 37-42-322, MCA
- ARM 16.20.801-805

**2. Program Goals.** Based on the above-referenced guidance, the Public Water Supply Program has identified the following program goals:

## **Public Water Supply Program:**

1. Implement state and federal drinking water regulations.
2. Provide technical assistance and training to public water supply system operators.
3. Review plans for improvements to systems.
4. Provide assistance to the general public.

## **Subdivision Program:**

1. Ensure that the water supply, wastewater treatment, storm water drainage and solid waste disposal facilities for proposed subdivisions meet minimum standards.
2. Protect Montana's water resources.

## Water and Wastewater Operator Certification Program:

1. Administer the testing and continuing education requirements for individuals in responsible charge of public water and wastewater systems.

### 3. Program Activities.

**Public Water Supply Program:** The Public Water Supply Program regulates 1,930 water supply systems that serve 15 or more service connections or 25 or more people. About one half of this total is systems serving transient populations, i.e., schools, campgrounds, restaurants, etc. The other one-half is systems serving residential populations. These systems serve over 600,000 Montana citizens.

The program participates in a very active statewide operator training program that also involves other technical assistance providers. The program emphasizes operator training, technical assistance, and proper water treatment and monitoring. These activities promote public health protection through preventive measures.

The program also reviews plans for proposed improvements or modifications to public water and wastewater systems to ensure conformance with minimum state standards.

**Subdivisions:** The Subdivision Program reviews proposed subdivisions to ensure the adequacy of the water supply, wastewater treatment, storm water drainage and solid waste disposal. Subdivision applications have increased significantly since 1990. There were 1,508 subdivision applications that created 6,922 lots in 1995.

**Water and Wastewater Operator Certification Program:** Montana operators are responsible for ensuring safe and palatable drinking water for more than 600,000 Montanans daily and for ensuring that wastewater from our communities and industries does not pollute state waters. Program staff administer certification exams and provide training and continuing education regarding operations and safety for these high risk professions.

<b>Program Activities</b>	<b>FY 96 Budget<sup>1</sup></b>	<b>FY 96 FTEs<sup>2</sup></b>	<b>Avg. Years Staff Retntn.</b>	<b>1995 Ongoing Projects/Sites</b>	<b>Avg. Acres/ Site</b>	<b>Avg. # of new proj./yr<sup>3</sup></b>
Public Water Supply	1.581	20.25	4	1930 +	N/A	350
Subdivisions	.555	6.3	2	+/- 100	N/A	1500 +
Op. Certification	.061	1.25	3	1400 +	N/A	100

Notes:

1. Figures in millions of dollars.
2. Includes administrative, attorney, management staff positions.
3. Refers approximately to last 5 years.

source: Melstad, 1996.

## Fees and Charges.

### **Public Water Supply Program:**

<u>Type</u>	<u>Amount</u>	Typical Annual <u>Total</u>	Allowed <u>Uses</u>
Service Connection Fees:		\$520,000	PWS Program
Community System <sup>1</sup> :	\$2	(Total)	Administration
Nontransient system:	100		
Other:	50		
Public System Improvement			
Review Fees:	Varied <sup>2</sup>	45,000	
Additional MEPA Fees:	MEPA Fees		
Noncompliance Penalties:	< 10,000/day		General fund
<b>TOTAL:</b>		<b>\$565,000</b>	

#### Notes:

1. Per service connection.

2. Varies greatly depending on the nature of the system and of the improvement. Typical fees range from \$50 to 1200.

### **Subdivisions:**

<u>Type</u>	<u>Amount</u>	Typical Annual <u>Total</u>	Allowed <u>Uses</u>
Subdivision Review Fees:	Varies <sup>1</sup>	\$558,500	Subd. Program
Permit Renewal Fees:	Not Authorized		Administration
Additional MEPA Fees:	MEPA Fees		
Noncompliance Penalties:	< 1,000/day		General Fund
<b>TOTAL:</b>		<b>\$558,500</b>	

#### Notes:

1. Varies from \$30 for review of a lot with an extension of existing municipal water and sewer systems to \$120/lot using an individual septic system and water supply.

### **Water and Wastewater Operator Certification Program:**

<u>Type</u>	<u>Amount</u>	Typical Annual <u>Total</u>	Allowed <u>Uses</u>
Certificate Application Fee:	\$30	3,000	Op. Cert. Program
Annual Renewal Fee:	30	60,000	Administration
Additional MEPA Fees:	MEPA Fees		
Noncompliance Penalties:	Not Authorized		
<b>TOTAL:</b>		<b>\$63,000</b>	

## 4. Regulated Communities.

**Public Water Supply Program:** Any water supply that serves 15 or more service connections or 25 or more people is defined by law as a public water supply and is regulated by the program. Approximately 1,930 regulated systems exist in Montana.

**Subdivisions:** State law requires program review of water, wastewater, stormwater, and solid waste facilities on land divisions where one or more parcels less than 20 acres in size is created.

**Water and Wastewater Operator Certification:** State law requires certification of individuals in charge of public water supply, water distribution and water treatment facilities

**5. Philosophical Approach to Compliance.** The philosophy of the Drinking Water Program is that preventing contamination is easier than correcting it. Therefore, the program stresses adequate training and education for the regulated community. When a violation occurs, the program will first attempt to achieve compliance through informal enforcement actions. These action may include informal discussions with a violator, on-site technical assistance, letters, etc. If these actions fail, program staff will use the DEQ's enforcement response guide to select the appropriate formal enforcement action.

**6. Compliance Tools Available and Used.** The menu of tools used by the programs to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.**

**Public Water Supply Program:** The greatest incentive for compliance with DEQ's rules and regulations is the desire to provide good water to their clients. Also, compliance eliminates the possibility of penalties. Finally, compliance may result in reduced monitoring requirements, depending on the nature of each PWS.

**Subdivisions:** Compliance eliminates the difficulty that could occur with lots sales or with home financing on lots that do not comply. (Reimposition of sanitary restrictions would prohibit lot sales; some lending institutions will not loan money for home construction when noncompliance is an issue.)

**Water Treatment Plant Operators:** Certification provides an individual with a measure of professional accomplishment and job security. Certification remains with an individual; it can be utilized by that individual at any similar PWS in the state. A high level of professionalism exists among certified operators in Montana.

**8. History of Compliance.**

**Public Water Supply Program:** There are many episodes of technical noncompliance due to the new federal rules. Most of these noncompliances are not significant violations.

**Subdivisions:** The greatly increased demand for land acquisition in Montana over the past 5 years and the subsequent level of subdivision activity has resulted in an increased number of violations. The most common violation is construction without DEQ approval.

**Water Treatment Plant Operators:** The program has experienced a high level of compliance over the years.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- PUBLIC WATER SUPPLY PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/T.A.:</b> * Annual Training	<p>Annual training events are scheduled through coordination with the Montana Environmental Training Center. Training is scheduled in advance to provide appropriate a variety of training opportunities to water and wastewater system operators in all parts of the state.</p>	Program staff	35
* Technical Assistance	Technical assistance is provided on a routine as-requested basis.		25
* General Information	General information is provided to water suppliers, consultants, sanitarians, other private and governmental organizations and to the general public on a daily basis.		Routine
<b>Comp. Planning/Withdrawals:</b> Not Authorized			
<b>Permits/Certifications/Bonds:</b>	Plan approval for improvements to public water and wastewater systems is required prior to construction. Because of increased regulatory responsibilities, approximately two-thirds of projects are reviewed by a contracted consultant.	Program Staff Engineers Consultants	325



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- PUBLIC WATER SUPPLY PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> * Monitoring  * Inspections	<p>1930 public water supplies are self-monitored regularly for as many as 100 + contaminants, depending upon system type and size. Monitoring for treatment effectiveness and for contaminants occurs at regular frequencies. Monitoring frequencies vary from daily to once every 3 years or more, depending upon the treatment process or contaminant.</p> <p>State, contracted county sanitarians and PWS staff perform inspections. Inspections occur annually, or every three years, depending upon system type.</p>	<p>Program Staff or contractors</p>	<p>Many 1000's</p> <p>600- Approx</p>
<b>Administrative Notices/Orders:</b>	<p>Authority is granted in the PWS Law for administrative orders to address violations of the act. Used in accordance with provisions of the DEQ Compliance/Enforcement Manual. Normally used for less serious and/or less contentious violations to implement conformance with the PWS law. (See ARM 16.20.801-805)</p>	Division Administrator	2 <sup>1</sup>
<b>Admin. Penalties/Sanctions:</b>	<p>Authority in PWS Law for administrative penalties of up to \$500/day. Penalties used when culpability, history or seriousness of violations or other factors warrant such action. ARM 16.20.801-805 addresses administrative order procedures and minimum penalties for common violations.</p>	Division Administrator	1
<b>Civil Judicial Action:</b>	<p>Judicial action and civil penalties sought typically for more serious and/or contentious violations of the PWS Law, or when administrative remedies are not successful. Authority for judicial action and civil penalties up to \$10,000/day in PWS law.</p>	DEQ Director	0.0000
<b>Criminal Judicial Action:</b>	<p>Criminal penalties, misdemeanor charges, are sought when violations result from gross negligence, intentional noncompliance or failure to comply with court or department orders.</p>	DEQ Director	0.0000

Notes:

<sup>1</sup> Enforcement activity generally lower in 1995 because of state agency reorganization and development of revised WQD enforcement procedures.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SUBDIVISION REVIEW PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Education/Information/T.A.:</b> * Training and Technical Assistance * General Information	<p>Training and technical assistance are provided when time allows staff to respond to requests. Ability to respond is limited because of the number of subdivision applications.</p> <p>Information is provided to applicants, consultants, other governmental and private agencies routinely on a daily basis.</p>	Program Staff	15
<b>Comp. Planning/Withdrawals:</b> Not Authorized			Routine
<b>Permits/Certifications/Bonds:</b>	<p>DEQ review and approval of water, wastewater and stormwater improvements, i.e., the lifting of sanitary restrictions. Review and approval is required prior to construction for new lots less than 20 acres in size. Some exemptions apply. Conditions are included in each approval document. Filing of the document in the county clerk and recorders office is required before the parcel can legally be created. Approximately 50% of all reviews are now performed by contracted consultants.</p>	Program Staff	1500 +
<b>Monitoring/Inspections:</b> * Monitoring * Inspections	<p>Monitoring is required of wastewater systems that are installed in areas where impacts to state waters may occur, or where experimental treatment systems are proposed. Owners or a DEQ approved agent are normally required to perform monitoring, but department staff may also monitor as time allows.</p> <p>Inspections are performed as time allows when large subdivisions or subdivisions in environmentally sensitive areas are proposed.</p>	Program Staff	25
<b>Administrative Notices/Orders:</b> Not Authorized			10

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- SUBDIVISION REVIEW PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Admin. Penalties/Sanctions:</b> * Penalties Not Authorized  * Sanctions	<p>No authority for administrative penalties in Sanitation in Subdivisions law. Authority for administrative penalties in the Public Water Supply Law may be used where public water systems are utilized within subdivisions.</p> <p>The reimposition of sanitary restrictions is an administrative procedure that is used when conditions of approval have not been observed, and when the owner/developer still owns lots within the development. Reimposition occurs only after the owner/developer has had an opportunity for an administrative hearing before the DEQ. Reimposition is accomplished through the county clerk and recorder's office, and prevents further transfer of lot ownership until noncompliance is corrected.</p>	<p>Division Administrator</p> <p>Division Administrator</p>	<p>unk</p> <p>0</p>
<b>Civil Judicial Action:</b> * Court Order and Penalties  * Injunctive Relief	<p>May be used when administrative relief is exhausted and violations are unresolved. Penalties up to \$1000/day.</p> <p>Injunctive relief is typically sought when construction of infrastructure facilities has begun prior to DEQ approval.</p>	<p>DEQ Director</p>	<p>0<sup>1</sup></p> <p>0</p>
<b>Criminal Judicial Action:</b>	<p>Misdemeanor charges may be filed for willful violations. Fines up to \$1000/day.</p>	<p>DEQ Director</p>	<p>0.0000</p>

Notes:

<sup>1</sup> Two requests for formal enforcement action have been approved by the WQD enforcement team, but the type of action has not yet been determined.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPERATOR CERTIFICATION PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
Education/Information/T.A.:	See information provided under Public Water Supply Program.		
Comp. Planning/Withdrawals: Not Authorized			
Permits/Certifications/Bonds:	Operators must be certified to be in responsible charge of a public water or wastewater system. Operators must pass an examination and meet minimum experience requirements in order to become fully certified. Continuing education credits are required on a biennial basis.	Program Staff	1400 +
Monitoring/Inspections: Not authorized			
Administrative Notices/Orders: * Informal Notice	Informal notices of violations are routinely used when PWS owners do not employ a fully certified operator.	Program Staff	10
* Disciplinary Action	DEQ may reprimand a certified operator for incompetence or gross negligence.	Program Staff	0
* Administrative Order	Administrative orders may be used when the owner of a community public water system does not employ a fully certified operator.	Division Administrator	0
Admin. Penalties/Sanctions: * Penalties	Penalties may be used when the owner of a community public water system does not employ a fully certified operator.	Div. Admin.	0.0000
* Sanctions	DEQ may suspend or revoke a certificate for incompetence or gross negligence.	Div. Admin.	

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- OPERATOR CERTIFICATION PROGRAM**

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
Civil Judicial Action: Not Authorized			
Criminal Judicial Action:Not Authorized			

**9. "Violations."** The quality of water provided by public water suppliers is significantly better than in 1985. Small suppliers still struggle to meet regulatory requirements, however, and water provided by small suppliers violates standards on a fairly regular basis.

**Public Water Supply Program:** As noted above, there are many technical violations because of the voluminous, prescriptive new federal rules. Data on formal enforcement actions is reported in the tables above.

Violations detected by self-monitoring (or lack thereof) are listed by rule below:

1. Surface water treatment rule: 613 violations by 216 PWSs.
2. Total coliform rule: 2,141 violations by 1,014 PWSs.
3. Lead and copper rule: 190 violations by 150 PWSs.
4. Phase 2 & phase 5 rules: 9,239 by 216 PWSs.

Complaints received in 1995 that resulted in violations: approximately 5

**Subdivisions:** There were approximately 10 documented violations of the Sanitation in Subdivisions Act in 1995. The large number of subdivision applications and staff turnover have limited the staff's ability to resolve violations.

Complaints received in 1995 that resulted in violations: approximately 10

**Water Treatment Plant Operators:** Compliance is good among water suppliers and operators. It is estimated that there are currently only about 10 community public water suppliers without certified operators. Turnover in operator personnel sometimes results in periodic transient noncompliance, but compliance is typically achieved when a new certified operator (or an operator-in-training, with DEQ approval) is hired.

Complaints received in 1995 that resulted in violations: 2

**Discovery of Violations.** Program staff indicate that data are not readily available. However, they state that it is the responsibility of each public water supply system to report violations to the DEQ. Therefore most Public Water Supply Program violations are a result of self reporting. Most violations in the Subdivision Program are identified through citizen complaints.

### Violations Discovered, by method, 1995

<u>Group</u>	<u>Total</u>	<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
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**PWSA:**

**Subdivisions:**

**Water Treatment**

Refer to information on preceding page

**Plant Operators:**

## **10. Considerations in Calculating Penalties.**

The program's enforcement policy includes a penalty calculation policy based on the benefit of noncompliance model (see also ARM 16.20.801-805). This determines the costs that were avoided by failure to comply with appropriate regulations.

## **11. Resolution of Noncompliances.**

**Public Water Supply Program:** Virtually every violation results in at least one informal response; usually a monitoring letter. Many informal enforcement efforts are also implemented through phone calls, field visits (technical assistance), training sessions, and through contracted technical assistance. The PWS Program has implemented draft versions of Enforcement Response Guides (ergs) for each rule. Particular attention is given to significant noncompliers (SNCs - an EPA defined status based upon a certain number of violations). The program has also attempted to resolve old back-logged enforcement cases in order to proceed with new noncompliance issues. The program has 9 outstanding administrative orders, and has recently submitted formal enforcement requests for over 100 violations to the Division Enforcement Team. Public notice will be given in the near future for many PWSs that are SNCs before formal action is taken against the supplier.

**Subdivisions:** The Subdivision Program has also attempted to resolve old back-logged enforcement cases, and has implemented the draft version of an enforcement response guide. The program has had one formal enforcement action request approved in 1995 and one in 1996. As mentioned, the program has limited ability to perform enforcement because of the high number of subdivision applications and a limited review time.

**Operator Certification:** The program has implemented a draft version of an enforcement response guide. Violations are typically resolved through informal efforts, and through concurrent efforts of the PWS Program when noncompliance issues overlap with the PWS law.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Public Water Supply Program:

**Public Water Supply Program:** Continued informal and formal efforts will continue as PWS Program and Enforcement Division resources allow. Some SNCs may be referred to the EPA. Also,

efforts to negotiate with the EPA to prioritize compliance and enforcement activities will continue

**Subdivisions:** Formal and informal efforts will continue. The 1996 Legislature may approve additional staff, or the rate of subdivision activity may decline.

**Water Treatment Plant Operators:** Increased training and education for water treatment plant operators is a priority in this program.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** The EPA has the authority to "overfile" on the Montana PWS Program if enforcement actions are not satisfactory to achieve compliance.

**Partnerships.** The PWS Program may be able to refer some SNCs to the EPA when state resources are limited.

**Delegated Authority.** No enforcement authority can be delegated to local governments, but many local health departments perform inspections and plan review for the PWS and Subdivision Programs.



# Ground Water Program

The Montana Ground Water Pollution Control System Program was established in 1982. The program includes ground water quality standards, a ground water classification system, MGWPCS permits system, and authority to respond to spills which cause ground water contamination. Currently there are 40 ground water discharge permits covering a variety of activities including fly ash land fills, small gold milling operations, animal and dairy waste operations, fuel contaminated soil land farms, and wastewater ponds. Many activities are excluded from obtaining a MGWPCS permit because they are permitted by another regulatory program, such as landfills and mines. The program also responds to complaints or spills involving ground water. About 90 sites are currently under investigation or being cleaned up and at least 150 have been completed. Program staff are also responsible for ground water pollution prevention activities related to public water supply wellhead protection, local water quality districts, pesticides in ground water and nonpoint pollution prevention.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Ground Water Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Article II, section 3** - "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . ."
- **75-5-101, MCA. Water Quality Act** policy statement. "It is the public policy of this state to conserve water by protecting , maintaining, and improving the quality and potability of water."
- **7-13-4501, MCA. Local Water Quality Districts.** "The purpose of this part is to provide for the creation of local water quality districts to protect, preserve and improve the quality of surface water and ground water."
- **80-15-101, MCA. Agricultural Chemical Ground Water Protection Act** policy summary: 1) protect ground water and environment from impairment due to pesticide, 2) allow for proper use of pesticides, 3) provide for proper management of pesticides, and 4) provide for education and training.

Supplemental and/or related state authorities:

- None

Related federal authorities:

- None

Specific enforcement authority:

- 75-5-601, MCA et seq
- ARM 16.20.1001. Ground water pollution control system regulations contain ground water classifications and standards, permitting requirements and authority to require reporting of spills and remediation.
- ARM 16.20.501. Local water quality district regulations describe program requirements and procedures for granting enforcement authority.
- ARM 4.11.101. Agricultural Chemical Ground Water Protection Act rules describe triggers for specific management plans, and enforcement and penalty authority for the Montana Department of Agriculture.

Primacy and Jurisdictional Agreements:

- None

**2. Program Goals.** Based upon the above-referenced guidance and the Montana Ground Water Plan, the Ground Water Program has identified the following policy and program goals:

1. Policy Statement. It is the policy and practice of the State of Montana to protect and improve the quality and quantity of Montana's ground water resources. The Montana Ground Water Plan sets forth actions for improved public and private management of Montana's ground water which will sustain current and future uses.

2. Protection Goal. To protect and improve the quality and quantity of Montana's ground water resources to sustain current and future uses.  
3. Education Goal. To engage Montanans of all ages in personal or public action that supports wise ground water use and management.

4. Remediation Goal. To eliminate or reduce harmful impacts to human health and the environment posed by ground water contamination.

**3. Program Activities.** The Ground Water Program is actually composed of several smaller programs related to ground water pollution prevention and control. Program activities can be generalized as follows: 1) program administration, budgeting and planning, staff supervision, regulatory and legislative work; 2) wellhead protection program implementation; 3) Montana Ground Water Pollution Control System (MGWPCS) permit program, respond to citizen complaints related to ground water and oversee remediation of spill/contaminated sites; 4) pesticides in ground water and nonpoint ground water pollution initiatives; 5) oversight of the local water quality districts program; and 6) development and implementation of the Comprehensive State Ground Water Protection Program (CSGWPP) to coordinate ground water activities. Staffing and funding for these activities are described in more detail below. Enforcement activities are associated primarily with MGWPCS permits, spill/contamination cleanup oversight and local water quality districts.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr<sup>2</sup></u>
Administration	91,310	1.5	> 10	NA	NA	NA
Wellhead protection	53,712	1.0	2	58	5-15	NA
MGWPCS permits	214,848	4.0 <sup>3</sup>	3	40	5-10	
Complaints investigation	--	--		25	15-30	
Spill/contamination sites	--	--		90	15-30	
Pesticides/nonpoint	18,799	0.35	4	5	1	
Local WQ Dist.	16,144	0.3	2	4	1	

CSGWPP 13,4290.2

**Notes:**

1. Does not include 0.2 FTE Division Adm; 0.4 FTE attorney.
2. Refers approximately to last 5 years.
3. Includes 1.0 FTE WQ Spec. in enforcement section

**Fees and Charges.** Ground Water Program revenues from fees and charges are described below. The fees are authorized by statute but set by the Board of Environmental Review. See ARM 16.20.1604 for a current fee schedule.

<u>Type</u>	<u>Typical Amount</u>	<u>Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees:	\$200 - \$2,500 <sup>1</sup>	Not Available	All fees are used for general program support
Annual renewal fee	\$250 - \$2,500	\$25K - \$30K	
Interest penalty on late fees	15%	Not Available	
Additional MEPA Fees:	None		
Noncompliance Penalties:	Up to \$25,000/day	<u>Not Available</u>	
<b>TOTAL:</b>		<b>\$25K - \$30K</b>	

**Notes:**

1. These fees vary depending on the specific discharge source. See ARM 16.20.1604 for more information.

**4. Regulated Communities.** Requirements of the Water Quality Act apply to any person that may impact the quality of surface water or ground water. Anyone who discharges wastes where they will impact water quality is a member of the regulated community. The Ground Water Program manages a MGWPCS permit system to control activities that discharge pollutants to ground water. Many activities such as mining, hazardous or solid waste disposal, domestic sewage disposal, oil and gas drilling, etc., are excluded from MGWPCS permits by statute because they are permitted by another program.

MGWPCS regulations are currently undergoing revisions that will give the DEQ the authority to require MGWPCS permits for public sewage systems that discharge into ground water. The program is unable to process permits for many activities that impact ground water because of limited staff and the large number of activities that discharge pollutants to ground water. Some of these unregulated activities include dozens of animal waste management sites and hundreds of shallow disposal wells. Some shallow disposal wells are regulated by the federal Underground Injection Control (UIC) program. The Ground Water Program hopes to obtain authority and funding from the EPA within the next few years to administer the UIC program in Montana. At the present time, priority is given the largest operations situated in areas where high quality ground water is threatened. Using this approach, five to ten animal waste management/disposal operations are permitted each year.

The program also responds to cases where ground water contamination is present. These cases are either spill sites or locations where contamination is discovered by a site assessment conducted prior to a property sale. Owners of property with contaminated ground water are also included in the regulated community.

#### **5. Philosophical Approach to Compliance.**

Ground Water Program staff know that ground water pollution prevention is easier and less expensive than ground water contamination cleanup and the program is always trying to expand its pollution prevention and education activities. A discovery of ground water pollution is typically considered a violation. Necessary response actions include: mitigation of impacts to water users, source elimination or control, and then cleanup. The program's general approach is to work with the responsible party to ensure these actions are accomplished in a timely manner. Program staff provide regulatory guidance and technical assistance to the responsible party to assist them in coming into compliance. Only when a responsible party is repeatedly out of compliance and blatantly recalcitrant does the program consider a formal enforcement action.

**6. Compliance Tools Available and Used.** A matrix explaining how enforcement tools are used by the Ground Water Program is shown on the following pages. Informal enforcement tools include: phone calls and meetings, notice of violation letters, request for corrective action letters, and permit modifications or revocations. Informal enforcement tools are utilized on a daily basis by program staff to deal with permit violations or to address violations of standards at ground water contamination sites, such as at spill sites. Unfortunately, the lack of an adequate enforcement tracking system does not allow for a quantitative evaluation of informal enforcement actions.

Formal enforcement actions include administrative, civil or criminal orders and penalties. The program has developed a enforcement response guide and ranking system to assist in prioritizing violations for enforcement and to assist in deterring appropriate enforcement response.

**7. Incentives for Compliance.** Payment of a \$25,000 per day per violation penalty as specified in the Water Quality Act should to be a financial incentive to remain in compliance. Historically, however penalties in these amounts have been rarely assessed. The new enforcement procedures manual describes penalty calculation process. Additionally, the desire to be viewed by the public as a good corporate neighbor is often cited as a reason for a company to remain in compliance.

**8. History of Compliance.** Again, the lack of an adequate enforcement tracking system does not allow for a quantitative evaluation of historical compliance. Also, many facilities that violate ground water quality standards are permitted by another regulatory program and the DEQ Ground Water Program does not track these violations. For sites that have MGWPCS permits, most are in compliance. One formal enforcement action has been taken against a permitted facility in the past five years. This case was the revocation of the Chicago Mining Co. MGWPCS permit for the Pony Mill.

Most spill sites and ground water contamination sites are in violation of a ground water quality standards. Informal enforcement actions are usually adequate to achieve a voluntary clean up at these sites. Formal enforcement actions (civil complaint with penalties) have been levied against a few sites for major ground water pollution problems. Examples of these sites include the Conoco pipeline leaks near Avon and Garrison. Violation of ground water quality standards has been the basis for several formal enforcement actions. These enforcement actions have been taken against facilities regulated by another program, such as the Pegasus Zortman-Landusky Mines or the Burlington Northern Livingston Rebuild Center.

Generally the number of violations is on the increase because the department is beginning to track them better. However the number of formal enforcement actions had decreased because of lack of staff resources. Ultimately, because ground water remediation is expensive and long-term, many sites remain in violation for numerous years without a reasonable prospect for clean up.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- GROUND WATER PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
Education/Information/T.A.: * Public Education	No formal ground water education program. Training and materials are provided to other programs, the public and the regulated community by speaking at seminars, training sessions when requested.	Staff	20
* Information	Guidance documents and information materials are produced as staff determine the need and are able to take the time to produce a product. Example: Animal waste management handbook.	Staff	3
* Technical Assistance/ Regulatory Interpretation	Staff are on the constantly on the phone and write letters daily to provide technical assistance and regulatory interpretations to other programs, the public and the regulated community. Technical assistance is also provided during inspections and in inspection reports.	Staff	Routine
Comp. Planning/Withdrawals: Not Authorized			
Permits/Certifications/Bonds: Montana Ground Water Pollution Control System Permits	Permits are required for discharges of pollutants to ground water that are not excluded. Permits contain operation and monitoring requirements. Failure to comply with permit requirements will trigger an informal enforcement action. DEQ has the authority to accept a reclamation bond submitted voluntarily but does not have bonding authority for MGWPCS permits.	Manager/ Staff	3

source: Arrigo, 1996

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- GROUND WATER PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>Monitoring/Inspections:</b>	Permittees submit self-monitoring data and inspections are conducted to determine compliance and collect samples. If permit violations are detected they are noted in inspection reports and correspondence and trigger an enforcement action.	Manager / Staff	90 (Approx)
<b>Administrative Notices/Orders:</b> Informal Enforcement Actions: * Phone Calls and Meetings * Notice of Violation Letters * Request for Corrective Action	As noted in the above information, any variance from the statutes, regulations, or permit conditions, or any ground water pollution, is a violation that will trigger some form of enforcement action. Staff will attempt to work with the violator to ensure compliance.	Staff	Not Available <sup>1</sup>
<b>Formal Actions:</b> * Administrative Orders * Permit Modifications and Revocations	If informal enforcement actions do not succeed in bringing the facility into compliance, formal actions are considered. See Water Quality Division enforcement procedures manual for details.	Manager	Admin Orders-25 Permit Revoc's - 1
<b>Admin. Penalties/Sanctions:</b> See -- for details <sup>2</sup>			0.0000
<b>Civil Judicial Action:</b> See -- for details			0.0000
<b>Criminal Judicial Action:</b> See -- for details			0.0000

## Notes:

<sup>1</sup> As noted earlier, the lack of an adequate enforcement tracking system does not allow for a quantitative evaluation of informal enforcement actions.

<sup>2</sup> The Water Quality Division has adopted an enforcement procedures manual to ensure uniform and consistent enforcement of the water quality laws. Therefore, this information is similar for all formal enforcement actions within the division.

source: Arrigo, 1996

**9. "Violations."** During CY 95, the Ground Water Program took enforcement actions on 36 violations. Additional information regarding these violations is shown beginning on the next page. In CY 90, the program identified 12 violations. Program staff say that better tracking of complaints, investigations, and monitoring reports is the main reason for the apparent increase in violations in CY 95.

**10. Considerations in Calculating Penalties.** The program's enforcement policy includes a penalty calculation policy based on the benefit of noncompliance model. This determines the costs that were avoided by failure to comply with appropriate regulations.

**11. Resolution of Noncompliances.** As stated earlier, most violations are addressed informally through education and technical assistance. However, due to the long term nature of problems associated with ground water contamination, identified violations in the Ground Water Program are difficult to completely resolve. As shown on the next page, nine of the 36 violations identified in CY 95 have been completely resolved through cleanup or other required action if cleanup was not required. Of the 12 violations in CY 90, four have been completely resolved through cleanup.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Ground Water Program:

- Revision of the MGWPCS regulations to correspond to Water Quality Act amendments.
- Development of an MGWPCS permit to control sources of pollution not subject to regulation prior to Water Quality Act amendments. Specifically, permits for public sewage systems that discharge to ground water.
- Development of an underground injection control program (UIC) and submittal to the EPA for authorization and funding. A Montana UIC program is necessary to control the hundreds of shallow injection wells that cause pollution of high quality ground water.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** No federal authority for a Ground Water Program is available for delegation. The EPA funds state activities related to ground water under Section 106 of the federal Clean Water Act. Work activities are conducted in accordance with annual State/EPA Agreements. The EPA has "approved" Montana's Wellhead Protection Program but no delegation or funding for that program is available. The DEQ anticipates the EPA will "endorse" its Comprehensive Ground Water Protection Program in 1996, but no delegation or funding is associated with the comprehensive program.

**Partnerships.** Through development of the Comprehensive Ground Water Protection Program, the DEQ Ground Water Program will work to bring consistency in activities related to ground water, to assist in identifying and filling gaps, and to eliminate duplication.

**Delegated Authority.** Local water quality districts are allowed under statute to adopt water quality regulations that cover situations or entities not regulated by the water quality act. The Ground Water Program does not delegate any authority to local water quality districts but the program may, on a case-by-case basis, authorize a district to enforce water quality statutes.

1995 Ground Water Violations, by Type and Status					
Month Violation Discovered	Type of Operator	Desc. of Violation	Penalty Assessed	Status at Year End	Significant Violation?
March	Small Business	Leaking Barrels	None	Active	Unknown <sup>1</sup>
April	CAFO <sup>2</sup>	Unpermitted	None	Active	No
July	Well Driller	Discharge w/o Permit	None	Active <sup>4</sup>	No
Sept	Small Business	Diesel Spill	None	Active <sup>5</sup>	No
April	City Shop	Disposal Pit	None	Active	No
Jan	City Lagoon	Permit Noncompliance	None	Active	No
Jan	Asphalt Plant	Asphalt Spill	None	Active <sup>5</sup>	No
Feb	CAFO	Unpermitted Discharge	None	Active	No
Feb	Oil Pipeline	Pipeline Leak	None	Active <sup>6</sup>	No
August	Rail Machine Shop	Diesel Spill	None	Active <sup>5</sup>	No
April	City Shop	Shop Drain Contamination	None	Active <sup>6</sup>	No
June	MDOT <sup>7</sup>	Leaking UST	None	Active <sup>6</sup>	No
June	MDOT	Gravel Stock Pile	None	Active	No
June	Maintenance Shop	Hydrocarbon Discharge - Sump	None	Active <sup>6</sup>	No
June	Oil Well	Crude Oil Spill	None	Active	No
August	Septic Systems	Well Contamination - Fecal Coli.	None	Active <sup>8</sup>	No
July	Oil Producer	Oil Spill	None	Active <sup>6</sup>	No
May	Electric Coop	Non-PCB Oil Spill	None	Active	No
October	Small Business	Failure to Submit Monitoring Reports	None	Active	No
June	Trailer Park	Sewage Lagoon Discharge	None	Active	No
October	Small Business	No Permit - Truck Wash Water	None	Active	No
June	City Lagoon	Unpermitted Discharge	None	Active	No
June	Diary Plant CAFO	Unpermitted	None	Inactive <sup>9</sup>	No
March	Small Business	Gas/Diesel Spill	None	Inactive <sup>10</sup>	No
July	Small Business	LWQD Ordinance Violation - Floor Drain	None	Inactive <sup>11</sup>	No
Feb	Transformer Station	Transformer Oil Spill	None	Inactive <sup>12</sup>	No
Jan	Small Business	PCP Release	None	Inactive <sup>11</sup>	No
July	Small Business	Hydrocarbon Discharge - Sump	None	Inactive <sup>12</sup>	No
April	Oil Refinery	Pipeline Leak	None	Inactive <sup>13</sup>	No
June	Rail Yard	Derailment Fuel Oil Spill	None	Inactive <sup>12</sup>	No
June	Ag Facility	Failure to Monitor and Keep Records	None	Inactive <sup>12</sup>	No
Jan	Ag Facility	Failure to Submit Annual Report	None	Inactive <sup>12</sup>	No
Jan	Small Business	Diesel Spill	None	Inactive <sup>12</sup>	No
Sept	Small Business	Diesel Spill	None	Inactive <sup>12</sup>	No
Jan	Small Business	Unpermitted Truck Washing Facility	None	Inactive <sup>12</sup>	No
June	CAFO	Offsite Runoff of Animal Waste	None	Inactive <sup>12</sup>	No

Notes:

- 1 The extent of the soil contamination is being investigated. The significance of the violation will be determined after the investigation is complete.
- 2 Confined Animal Feed Operation.
- 3 Recommend formal enforcement action.
- 4 Local Water Quality District has requested enforcement authority.
- 5 Cleanup ongoing.
- 6 First response cleanup complete, follow up inspections needed.
- 7 Montana Department of Transportation Shop
- 8 Monitoring area wells.
- 9 CAFO requirements incorporated into current MGWPCS permit.
- 10 Small amount of remaining hydrocarbons do not threaten state waters.
- 11 Referred to CECRA.
- 12 Cleanup complete or otherwise resolved.
- 13 Referred to EPA and RCRA

source: Arrigo, 1996.



## Discovery of Violations.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			<u>Citizen Complaint</u>
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection<sup>1</sup></u>	
Ground Water Violations	36	4	13	11	8

Notes:

1 Includes inspections by other state or local agencies.

# Surface Water

The Water Quality Division operates several programs related to protecting the quality of Montana's surface waters (streams, lakes and wetlands). They include activities related to controlling degradation of "high-quality waters", regulating discharges of pollutants into surface waters, and the many related studies and monitoring necessary to implement the surface water-related provisions of Montana's Water Quality Act and related laws and regulations. (Note: Division programs related to Public Water Supply, Subdivision Review, and Ground Water Protection are covered elsewhere in this summary.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for Water Quality Division activities related to surface water.

Primary constitutional and statutory authorities (see also Appendix B):

- **Montana Constitution, Art. IX, Sec. 1** refers to the responsibility of the state and individuals to maintain and improve a clean and healthful environment for present and future generations.
- **Montana Water Quality Act (MWQA)** (MCA 75-5-101 et seq.) provides for the conservation of water through protecting, maintaining, and improving the quality and potability of water for beneficial uses (public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, etc.).

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Montana Water and Wastewater Operator Certification Act** (MCA 37-42-201) provides for the certification of wastewater treatment plants in order to protect the public health and safety.
- **Montana Wastewater Treatment Revolving Fund Act** (MCA 75-5-11 et seq.)

- **Local Water Quality Districts Act** (MCA) 7-13-4501) provides for the creation of local districts to protect, preserve, and improve the quality of surface water and ground water.

Related federal authorities:

- **Clean Water Act** (PL 92-500, as amended by PL 100-4, February, 1987)

Surface water-related administrative rules:

- ARM 16.18.101-.102; 16.18.201-.209; 16.18.301-.311; 16.20.101-.103; 16.20.501-.506; 16.20.601-.643; 16.20.706-.714; 15.20.801-.805; 16.20.801-.805; 16.20.920-.976; 16.20.1301-.1347; 16.20.1401-.1416; 16.20.1701-.1709; 16.20.1801-.1810

Specific enforcement authority related to surface water:

- MCA 75-5-601 thru 75-5-641
- ARM 16.20.1307, 16.20.1327, 16.20.1329

Primacy and jurisdictional agreements:

- EPA-delegated authority for the MPDES Program

**2. Program Goals.** Based on the above-referenced guidance, the Water Quality Division has identified the following program goal related to surface water:

1. Maintain and improve the quality of Montana's water to protect public health and the environment.

**3. Program Activities.** Water Quality Division activities related to surface water consist primarily of the following:

**Water Quality Management:** monitors surface water quality, coordinates volunteer monitoring, develops biological standards, assesses compliance with water quality standards, identifies sources and causes of pollution, prepares 305(b) report and 303(d) lists, prioritizes waters for TMDL development, coordinates TMDL implementation, and plans and conducts watershed planning.

**Nonpoint Source Pollution:** identifies streams and lakes whose quality is adversely impacted by

nonpoint pollution sources, implements watershed demonstration and education projects, and monitors projects to evaluate benefits to water quality.

**Water Pollution Control:** investigates alleged violations of Montana water quality laws and undertakes enforcement if appropriate.

**Water Discharge Permits:** control the quality of wastes discharged into state waters.

**Municipal Wastewater Assistance:** provides technical and financial assistance to municipalities for design, construction and operation of wastewater treatment systems.

Resources available to and demands on these activities are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Average Years Staff Retained</u>	<u>1995 Ongoing Projects/ Sites</u>	<u>Average Acreage/ Project</u>	<u>Average # of New Proj./Yr<sup>1</sup></u>
Water Quality Mgmnt./ N-P-Source Poll.	\$1,416,900 <sup>2</sup>	11.2	5 +	200 + watersh./TMDL projects 800 + impaired segments	NA	5-6
Water Poll. Control	575,000	8.3	8 <sup>3</sup>	unk.	NA	unk.
Water Permits	513,800	9.6	7	0 Auth. to Degrade 400 + MPDES 300 + Stormwater	NA NA <sup>3</sup> NA	0-2 65 60
Municipal Waste- water Assistance	731,500	10.3	5	45	NA	12
Misc./Cost-Share	141,600	NA	NA	NA	NA	NA
<b>TOTAL</b>	<b>\$3,378,800</b>	<b>39.4</b>	<b>NA</b>	<b>NA</b>	<b>NA</b>	<b>NA</b>

Notes:

<sup>1</sup> Refers approximately to last 5 years.

<sup>2</sup> Does not include \$1,541,200 of ear-marked dollars to be passed through to conservation districts for non-point-source-related efforts.

<sup>3</sup> If 2 of the existing, long-time staff members are excluded, the average is 3 years.

<sup>4</sup> Average daily discharges vary from none to over 20 million gallons per day. Seasonal fluctuations may decrease discharges to zero, or increase them to over 80 million gallons per day. Seasonal flow fluctuations in receiving waters may allow discharge of more concentrated materials, while still meeting standards and permit requirements; this would be most pronounced on small streams, with large flow fluctuations.

sources: LFA, 1995; Pilcher 1996.

**Fees and Charges.** Fees associated with division activities related to surface water are described below. Maximum amounts for permit fees are set in statute; rules have been adopted which set categorical fees within statutory limits.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees: MPDES <sup>1</sup> /Stormwater	varied <sup>2</sup>	\$40,000	Legislatively-approved Program budgets (e.g. permitting, etc.) <sup>3</sup>

Degradation Auth. Review	varied <sup>2</sup>	typically none	(same as above)
Annual Fees:			
MPDES/Stormwater	varied <sup>2</sup>	497,000	(same as above)
Additional MEPA Fees:	varied	typically none	NA
Noncompliance Penalties:	varied	NR <sup>4</sup>	General Fund
<b>TOTAL:</b>		<b>±\$537,000</b>	

Notes:

<sup>1</sup> Fee is also assessed for major amendments to MPDES permits.

<sup>2</sup> Fees are based upon category of wastewater, and amount of discharge. Additional information is in ARM 16.20.1604.

<sup>3</sup> See 75-5-516 MCA.

<sup>4</sup> Typical annual amount was not reported (NR) by program staff. However, they do note that in the last 20 years, over \$650,000 in civil penalties have been assessed by the courts (collected?) for water quality violations (surface water only, or should only some portion of that be included here?); \$100,000 in agency costs have been recovered (surface water?).

source: Pilcher, 1996; Shewman, 1996.

**4. Regulated Communities.** Water Quality Division activities related to surface water typically involve three regulated communities: 1) entities whose activities may degrade Montana's "high quality waters"; 2) entities discharging or applying to discharge wastes into any of Montana's streams or lakes via an identifiable discharge point, such as a pipe, ditch, etc. (i.e. "point source" dischargers); and 3) entities whose activities may lead to water quality degradation through "nonpoint source" discharges (i.e. runoff picking up chemicals, excess levels of sediment, or other contaminants). The latter two communities are described below.

Any **point source dischargers** of pollutants to state surface waters for MPDES and stormwater programs. This also includes discharges into the ground or through the ground water which are obviously connected to surface waters or surface streams. This includes cities and towns with wastewater plants that discharge to state waters (which many do), and various industries (e.g. refineries, mines, oil producers, feed lots, power plants, construction activities such as dewatering and hydrostatic testing, meat packers, fish farms, railroad facilities, remediation facilities, air conditioning and heating and cooling discharges, etc.). As of the close of 1995, there were approximately 740 active waste discharge permits (surface, municipal and industrial, stormwater & groundwater discharges) on file with the Division.

**Nonpoint source dischargers** are those involved in activities that contribute to surface water pollution through increased contaminants in runoff (or percolation through groundwater), including sediments, heat, nutrients, organic wastes, bacteria, pesticides, toxic metals, and altered flow. As of 1994, the most prevalent sources of non-point-source pollution included; agriculture, mining, and forestry.

**5. Philosophical Approach to Compliance.** The division's top priority is keeping the regulated community in compliance with the water quality statutes and rules. For those who fail to see the benefits of compliance or fail to achieve compliance, formal enforcement may be necessary. The department developed the *Compliance and Enforcement Manual* to ensure responsible and consistent action related to water quality violations.

The approach to nonpoint source pollution compliance is a cooperative one involving education, protection of natural habitat (i.e. wetlands and floodplains), and financial incentives. Effective agricultural, forestry, and other management practices are encouraged by working closely with Conservation Districts on watershed-based projects.

**6. Compliance Tools Available and Used.** The Water Quality Division's formal inspection and enforcement procedures are documented in the division's *Enforcement and Compliance Manual*, in place since August 1995. The manual identifies guiding principles (policy), procedures, guidelines, and basic forms, and enables application of uniform enforcement principles, while allowing for appropriate levels of professional judgement in implementation. Upon completion of the manual, it was expected it would need to be reviewed and revised within 6 months. A formal review is currently being set up within the agency, but it cannot be fully modified until final reorganization proposals are determined. Agency staff expect the manual to provide direction for other DEQ programs, but no formal directive has been issued. No date has been set for final review of the manual.

The menu of tools used by the Water Quality Division to achieve their natural resource/environmental mandates related to surface water is shown beginning on the next page. **There are three separate matrices, one for each of the regulated communities described earlier: Degradation of "High-Quality" Waters; General and Point Source Dischargers; and Nonpoint Source Dischargers.**

**7. Incentives for Compliance.** According to program staff, civil penalties are a strong incentive for compliance with surface water-related rules and regulations. They should establish a level playing field for the entire regulated community by removing any economic advantage that would be associated with a failure to comply. It is department policy to recover civil penalties at least equal to the "economic benefit of noncompliance." The EPA provides a computer model to generate the appropriate figure. Bad press is also a deterrent to violations.

**Agency-Generated.** Regarding MPDES permittees, if discharges are less than half their permitted limit, annual fees can be reduced by up to 25% per operation. Reductions are pro-rated based on how close they are to half their limit (i.e. a 25% reduction in discharges yields a 12.5% reduction in fees, etc.). Approximately 40 percent of the MPDES permittees achieved the full 25% reduction in 1995. This included some who are able to retain all wastewater, and includes both industry and municipalities. Discounts can be substantial, since some permittees have up to a \$40,000 annual fee.

**Industry-Generated.** (None noted.)

**Other.** (None noted.)

**FIGURE A -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- DEGRADATION OF "HIGH-QUALITY" WATERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>DEGRADATION OF HIGH-QUALITY WATERS:</b> Education/Information/T.A.:	Education concerning the nondegradation process is conducted through informal meetings with staff, and responses to telephone inquiries, done on an ad-hoc, time-as-available basis. The last statewide formal training was done in 1995.	staff	NA
<b>Comp. Planning/Withdrawals:</b>	No formal comprehensive planning is done for nondegradation-related activities. (Please see Figures B and C for other DEQ planning activities related to surface water.)	NA	NA
<b>Permits/Certifications/Bonds:</b> "High-Quality Water" Degradation Review Process:  - Self-Determination of Non-Significance  - Application for Determination of Non-Significance  - Application to Degrade: - Preliminary Decision	<p>Any person proposing an activity that may degrade high-quality waters must be exempted from the review process, or generate or receive a determination that the degradation is not significant, or, if the proposal does not qualify for any of the preceding, must obtain an authorization to degrade (see below).</p> <p>A project proponent may use the standards in ARM 16.20.712 and 16.20.713 to determine his/her activity is clearly not significant unless the activity is permitted licensed, or otherwise authorized by the department.</p> <p>If the proposed activity does not fall within the categories identified as "nonsignificant," above, the proponent can request the department to determine whether the proposal would significantly degrade high-quality waters. The department must respond to the application within 60 days.</p> <p>If the above-described process has determined a proposed activity will significantly degrade high-quality waters, the proponent must apply for authorization to degrade. A preliminary decision either authorizing or denying the degradation must be issued within 180 days of receipt of completed application. The time period may be extended on agreement from the applicant, and/or if an EIS is required.</p>	<p>see below</p> <p>applicant</p> <p>Prog. Sup. Applicant staff</p>	<p>NA</p> <p>NT</p> <p>100s 0 0</p>

**FIGURE A -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- DEGRADATION OF "HIGH-QUALITY" WATERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>DEGRADATION OF HIGH-QUALITY WATERS (CONT.):</b> <b>Permits/Certifications/Bonds (cont.):</b> "High-Quality Water" Degradation Review Process (cont.): - Opportunity for Comment  - Authorization to Degrade	<p>Issuance of the Preliminary Decision includes public notification and initiates a 30-day comment period for those who have a real property, economic, or water right interest that may be adversely affected by the proposal. These "interested persons" may also request a hearing on the proposal.</p> <p>Authorization is issued if the department finds that all of the following apply to the proposal: 1) the degradation is necessary because there are no feasible modifications to the proposed project that would result in no degradation, 2) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of degrading high-quality waters, 3) existing and anticipated use of state waters will be fully protected, and 4) the least degrading water quality protection practices determined by the department to be economically, environmentally and technologically feasible will be fully implemented by the applicant prior to, during, and after the proposed activity. Otherwise, the application will be denied. A final decision must be issued within 60 days of the close of the comment period, and may include a statement of conditions for approval.</p>	<p>staff</p>	<p>0.00</p>
<b>Monitoring/Inspections:</b>	<p>Degradation authorizations, if granted, become part of any department permit, license, or authorization. Monitoring or inspections carried out under those authorities will ensure compliance with any authorizations to degrade. (See Figures B and C for additional information.)</p>	<p>Director</p>	<p>NA</p>
<b>Administrative Notices/Orders:</b>	<p>The department is authorized to, and will, pursue violations of degradation authorizations using the same procedures as for any other violation of the Water Quality Act. (Since there were no authorizations issued in 1995, there were no violations of issued authorizations, nor is there any data indicating any 1995 violations of the need for an authorization.) (See Figures B and C for additional information.)</p>	<p>NA</p>	<p>NA</p>
<b>Admin. Penalties/Sanctions:</b>	<p>The department is authorized to, and will, pursue violations of degradation authorizations using the same procedures as for any other violation of the Water Quality Act. (See Figures B and C for additional information.)</p>	<p>Prog. Sup.</p>	<p>0.00</p>
		<p>enf. staff</p>	<p>O</p>

**FIGURE A -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- DEGRADATION OF "HIGH-QUALITY" WATERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>DEGRADATION OF HIGH-QUALITY WATERS (CONT.):</b> Civil Judicial Action:	The department is authorized to, and will, pursue violations of degradation authorizations using the same procedures as for any other violation of the Water Quality Act. (See Figures B and C for additional information.)	Legal	0
Criminal Judicial Action:	The department is authorized to, and will, pursue violations of degradation authorizations using the same procedures as for any other violation of the state Water Quality Act. (See Figures B and C for additional information.)	Legal	0



FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>GENERAL, AND POINT SOURCE DISCHARGERS:</b> Education/Information/T.A.: Informal (phone, news) Technical Assistance	Done on an ad-hoc, time-as-available, basis. Program staff provide technical assistance by assisting people in staying in compliance and reminding them when they are not in compliance. Technical assistance is provided via seminars, meetings, over the phone, writing letters, inspections. The assistance provided includes interpreting permit requirements, discussion of violations, and providing strategies to return to compliance. The state provides financial assistance to municipalities via State Revolving Fund loans and limited planning grants. Funds must be used for design, construction and/or operation of municipal wastewater treatment plants.	staff	NA
Financial Assistance		staff	NA
Comprehensive Performance Evaluations	These evaluations are utilized when a review of reporting data indicates physical plant limitations or operational problems.	Prog. Sup.	4
Water Schools	Education program for wastewater treatment plant operators. Courses are offered during the spring and fall of each year.	staff	4
		staff	2
<b>Comp. Planning/Withdrawals:</b> Watershed Planning	As of 1994, watershed planning was being actively pursued in four of Montana's river basins, and the department expected over 30 more efforts to be initiated by 1999. Every 2 years, the department provides a report to the EPA regarding the status of Montana's water quality. Preparation for this report is based on a comprehensive monitoring and assessment program, including determination of uses supported, causes and sources of pollution, and levels of impairment for over 1,000 waters in Montana. The department occasionally pursues special studies to assist it with managing Montana's water quality. Examples of special studies include long-term trend analysis, development of biological standards, and lake diagnostic and feasibility studies. Determination of Total Maximum Daily Loads (TMDLs) for the Upper and Middle Clark Fork River, and Flathead Lake, is being pursued in partnership with local and tribal groups. Similar efforts are also being pursued for Swan Lake, Deep Creek (Townsend area), and in association with other watershed projects.	staff	unk.
305(b) Analysis/Reporting		staff	NA
Special Studies		staff	NA
TMDL Development		staff	unk.

FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>GENERAL, AND POINT SOURCE DISCHARGERS (CONT.):</b> Comp. Planning/Withdrawals (cont.): Wetlands-Related Activities</p>	<p>Department efforts related to wetlands affect water quality, as well as other resources and uses, and include; coordinating the collection of existing wetland information, developing wetland biological assessment criteria; collecting a baseline database of the least impaired wetlands, sponsoring wetland education programs, and providing an organizational structure that will allow existing wetland programs to better counter threats that exist.</p>	<p>staff</p>	<p>NA</p>
<p>Outstanding Resource Water (ORW) Classification:</p>	<p>Classification of surface waters as ORWs prohibits the state from granting an authorization to degrade. This prohibition does not apply to activities identified as "nonsignificant" or activities that are exempted from the nondegradation review process. (see Figure A, above, for discussion of "degradation".) Classifications must be approved both by the Board of Environmental Review (BER) and the legislature. A person may petition the BER to classify waters as ORWs. The board will reject a petition unless it contains sufficient credible information for the board to review. If the board rejects the petition, it will specify its reasons for rejection and any deficiencies in the petition.</p>	<p>see below</p>	<p>NA</p>
<p>- Petition</p>	<p>The BER will consider the following in determining whether to classify a water body as an ORW: 1) Wild and Scenic River status, 2) presence of threatened or endangered species, 3) an outstanding recreational fishery, 4) sole source of domestic water supply, 5) other factors indicating outstanding environmental or economic factors. If the petition is accepted, and classification may cause significant environmental, social, or economic impacts, the board will require an EIS be prepared.</p>	<p>petitioner</p>	<p>0</p>
<p>- Pet. Acceptance/Consideration</p>	<p>Any board approval of a ORW classification must also be approved by the legislature. A system of classifying surface waters as to what actual and anticipated uses they did and could support upon initiation of the classification system in 1955.</p>	<p>board legislature</p>	<p>0 0</p>
<p>- Legislative Approval Water "Classification"</p>	<p>These provide quantitative water quality parameters that indicate the ability of the water body to support uses; they are typically expressed by "class" (described above).</p>	<p>NA</p>	<p>NA</p>
<p>Water Quality Standards:</p>	<p>The EPA requires review (and update where necessary) of water quality standards every three years. Montana has been in a process of continual updates over the last few years.</p>	<p>NA</p>	<p>NA</p>

FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>GENERAL, AND POINT SOURCE DISCHARGERS (CONT.):</b> <b>Permits/Certifications/Bonds:</b> General Permit (to Discharge): - Application - Authorization - Denial <b>Containment Requirements:</b>	<p>Certain specified categories of discharge (see ARM 16.20.1317) may be authorized by a summary procedure under a general permit authorization.</p> <p>Must be submitted on DEQ forms. Used in cases where discharges and controls are repetitious.</p> <p>After general permit issued, individual authorizations are provided by letter.</p> <p>General permits may be denied for reasons listed in ARM 16.20.1317(4).</p> <p>Leaching pads, tailing ponds, or water-, waste-, or product-holding facilities must be designed, constructed, operated, and maintained to prevent discharge, seepage, drainage, infiltration, or flow which may result in the pollution of state waters (also applies to ground water). This requires approval from the Water Quality Division, and may occur in conjunction with a MPDES permit process, a ground water permit, or a mine reclamation permit.</p> <p>Required for industrial runoff discharges falling within one of 11 listed categories in federal regulations (40 CFR 122.26(b)).</p> <p>Application is required on DEQ forms.</p> <p>Authorizations are granted by letter under one of three DEQ general stormwater permits.</p> <p>Renewal is required approximately every 5 years.</p> <p>(No information provided by program staff.)</p>	<p>see below</p> <p>applicant Prog. Sup. Prog. Sup</p> <p>Prog. Sup.</p> <p>see below applicant Prog. Sup. Prog. Sup. Staff</p>	<p>NA</p> <p>+50 +50 1</p> <p>unk.</p> <p>NA</p> <p>+60 +60 +20 1400</p>
<b>Stormwater Permit:</b> - Application - Approval - Renewal <b>Wastewater Operator Certification</b>			

**FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>Permits/Certifications/Bonds (cont.):</b> MPDES Permit:</p> <ul style="list-style-type: none"> <li>- Initial Determination</li> <li>- Opportunity for Public Hearing</li> <li>- Permit Approval</li> <li>- Permit Denial</li> <li>- Opportunity for Appeal</li> <li>- Permit Revision/Amendments</li> <li>- Permit Renewal</li> </ul> <p><b>MEPA:</b></p> <ul style="list-style-type: none"> <li>- Preparation of EAs</li> <li>- Preparation of EISs</li> </ul> <p>Minimum Treatment Requirement</p>	<p>A MPDES permit is required to construct, modify, or operate a disposal system, or to construct or use any outlet for discharge of sewage, industrial or other wastes into state surface water. ("Other Wastes" are defined at 75-5-103(15) MCA.) Exemptions to this requirement include: 1) dischargers of natural ground water that meets water quality standards, 2) holders of a National Pollutant Discharge Permit (NPDES) or a federal Refuse Act permit, 3) persons proposing land application of wastes where the wastes will not return to state waters. Applications for a MPDES permit must be received 180 days prior to the desired initiation of the discharge. Permits contain requirements for minimum treatment levels (per federal guidelines), reference to state-wide water quality standards that must be maintained in the receiving waters, and any specific parameters determined through permit review. Permits are granted if they are in compliance with the Water Quality Act. The permit period is usually 5 years. Upon receipt of a MPDES application, the Department must make a tentative determination whether to issue or deny a permit, then notify the public of their tentative determination. A 30-day comment period follows.</p> <p>The applicant, or any interested person or agency may request a public hearing (held in the geographical area of the proposed discharge) on the proposal.</p> <p>Permits are approved if operation consistent with permit conditions will not result in pollution of any state waters. MPDES permits are issued for a fixed term, not to exceed 5 years.</p> <p>Permits can be denied on the basis of the applicant refusing to correct deficiencies in the application, or if operation under the permit would result in pollution of state waters.</p> <p>If the department denies a permit, the applicant may appeal the decision to the Board of Environmental Review. A hearing must be held within 30 days of the applicant's written request.</p> <p>Permits may be reopened and modified (see ARM 16.20.1327(2) for valid reasons to reopen permit).</p> <p>Application for renewal must be received 180 days prior to the date of permit expiration.</p> <p>The department typically prepares Environmental Assessments (EAs) for all individual MPDES permits and for categorical general permits.</p> <p>Water Quality Division staff participate in Environmental Impact Statements (EISs) for those permits where the EA indicates major environmental impacts.</p> <p>Required by federal guidelines, minimum treatment levels, are national secondary</p>	<p>see below</p> <p>staff</p> <p>staff</p> <p>Prog. Sup.</p> <p>unk.</p> <p>Prog. Sup.</p> <p>staff</p> <p>Prog. Sup.</p> <p>staff</p> <p>staff</p> <p>NA</p>	<p>53</p> <p>3</p> <p>53</p> <p>unk.</p> <p>0</p> <p><u>+5</u> <u>+40</u></p> <p>53</p> <p>53</p> <p>1</p>

**FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> Informal (news, conversations) Review of Permittee Reports: - Self-Monitoring (DMR) Reports	Performed continuously on ad hoc, time-as-available, basis.	staff	NA
<b>Compliance Inspections:</b>	Permittee takes samples according to specifications in permit, sends them to a lab, and forwards results to the department, where they are checked for compliance against permit specifications. Reports are typically required monthly, and data is entered in an electronic database as soon as possible.	permittee/ staff	2000 +
- Annual - Every 5 years	Upon presentation of credentials, program staff may enter onto private property to investigate alleged water quality problems. Compliance inspections are not done very frequently, but include a comparison sample taken by program staff, and analyzed for comparison with permittee data.	staff	125
<b>Complaint-Generated Investigations</b>	Done for most major dischargers (i.e. 45 larger cities and industrial sites). This is a program goal for the remainder of the permittees, based upon the length of the permit period (5 years).	staff	45
Permits Compliance System (PCS) National EPA Tracking System	Typically done either for facilities that have permits, and are perceived to be violating, or on facilities that are discharging and do not have a permit. Complaints are validated by program staff within 30 working days of receipt. Validation typically consists of a visit by a person familiar with Water Quality Act requirements.	staff	80
<b>ECIS</b>	Permit requirements are entered into the database. When self-monitoring reports, agency compliance monitoring reports, or valid complaints are received, the information is also entered into the database. At the end of the month, a computer check is run, and violations are flagged. The system will also report violations by type, or location, or type of permittee, etc. Follow-up is addressed in monthly staff meetings.	staff	NA
<b>Volunteer Monitoring</b>	All validated violations, except "de minimus" (see below) are entered into a separate database, the Enforcement Compliance Information System (ECIS), which tracks complaints and enforcement action resolutions.	adm.staff	NA
	Volunteer water quality monitoring is not used for compliance/enforcement, but may be used for waterbody assessments, and in data collection regarding water quality conditions and trends, prioritization, and TMDL development. Many Montana citizens are active volunteer water quality monitors through the DEQ, as well as Fish, Wildlife & Parks, in a variety of locations, including the Clark Fork, Bitterroot, Flathead, Kootenai, Upper and Lower Yellowstone, etc.	NA	NA

FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>GENERAL, AND NON POINT DISCHARGERS (CONT.):</b> Admin. Incentives/Notices/Orders: Potential for Fee Reduction</p> <p>Note in File</p> <p>"Routine Response" to Violation:</p> <p>- Warning/Compliance Letter</p> <p>Staff Recommendation for Formal Enforcement Response</p> <p>Response to "Emergency" Violations Interim Limits</p> <p>Referral to EPA</p>	<p>If discharges are less than half their permitted limit, annual fees can be reduced by up to 25% per operation. Reductions are pro-rated based on how close they are to the half their limit (i.e. a 25% reduction in discharges yields a 12.5% reduction in fees, etc.).</p> <p>Occurs in the case of "de minimus" violations (i.e. low potential for harm, no similar violations at the site in past 3 years, problem has or will be resolved within 7 days of notification of violation, and there is no compelling policy or administrative reason to pursue further).</p> <p>This occurs for violations that are more serious than "de minimus" (see above), but are not considered to be of imminent risk to public health or the environment.</p> <p>A warning letter is sent to routine response violators. It includes identification of the violation, a specific request for action, establishment of time frames for compliance, and a statement describing the consequences of failure to comply.</p> <p>If program staff believe formal enforcement should be initiated, they fill out a "Case Ranking Form" to assign a numerical value for each violation. The Department then pursues a review process to determine which should be acted upon.</p> <p>Violations with imminent health or environmental risks are treated as emergencies and prioritized for immediate follow up, not left for regularly scheduled meetings.</p> <p>Can be used when a discharger is out of compliance, and it is recognized that compliance will take time. This is used with both municipalities and industry that have had difficulty raising funds to come into compliance.</p> <p>The department shares responsibility with EPA for PWSA and CWA. In certain circumstances (i.e. resource constraints), the Department may choose to request EPA to seek appropriate enforcement response.</p>	<p>staff/auto-matic</p> <p>staff</p> <p>see below</p> <p>staff</p> <p>staff</p> <p>staff</p> <p>Prog. Sup.</p> <p>Director</p>	<p>±280</p> <p>15-20</p> <p>NA</p> <p>160</p> <p>3</p> <p>0</p> <p>±12</p> <p>4</p>

**FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<p><b>GENERAL, AND POINT SOURCE DISCHARGERS (CONT.):</b> Admin. Penalties/Sanctions: Compliance Order</p> <p>Emergency Order</p> <p>Administrative Penalties</p> <p>Clean-Up Order</p> <p>Permit Suspension</p> <p>Permit Revocation</p>	<p>A person violating surface water requirements may be served with a compliance order, specifying the violation, and a timeframe for compliance. Setting the timeframe includes consideration of the seriousness of the violation and any good faith efforts that have been made.</p> <p>If the department finds that a person is committing, or is about to commit, a water quality violation that will cause substantial pollution that will not be immediately remedied, the department may order cessation or moderation of the activity to avoid substantial injury. A hearing before the Board is included.</p> <p>Rules to implement the Administrative penalty authority of the Montana Water Quality Act have been drafted and will be submitted to the Board of Environmental Review this summer.</p> <p>May be issued to order person to clean up any material accidentally or purposefully deposited that may pollute state waters. A penalty may accompany a Cleanup Order.</p> <p>The department may suspend a point-source (MPDES or stormwater) permit if fees have not been paid. The suspension may be lifted within a year, if the holder has paid all outstanding fees, penalties, assessments, and interest.</p> <p>Point-source permits may be terminated for noncompliance, permittee failure to disclose (or permittee misrepresentation of) pertinent information, endangerment of human health or the environment, or altered conditions (e.g. plant closure) requiring permit termination.</p>	<p>Enf. Staff</p> <p>Enf. Staff</p> <p>Enf. Staff</p> <p>Enf. Staff</p> <p>unk.</p> <p>unk.</p>	<p>3</p> <p>0</p> <p>4</p> <p>None</p> <p>None</p> <p>None</p>
<p><b>Civil Judicial Action:</b> Injunctions, Civil Penalties, Recovery of Investigative Costs</p>	<p>The department is authorized to pursue temporary or permanent injunctions for any violations that would be subject to a Compliance Order. Such actions may be pursued in the County where the violation occurred. The department is also authorized to pursue emergency injunctions upon receipt of evidence that a pollution source (or sources) is endangering the health, welfare, or livelihood of a person. The department may also pursue court action to collect civil penalties. A violator is subject to civil penalties not to exceed \$25,000 per violation, with each day of violation considered a separate violation. The department is authorized to request, and the Court is authorized to assess, a violator for the cost of the investigation or monitoring survey that led to the proof of the violation, as well as any department costs for repairing adverse affects of the discharge.</p>	<p>Legal</p>	<p>3</p>

FIGURE B -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- GENERAL, AND POINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>GENERAL, AND POINT SOURCE DISCHARGERS (CONT.)</b> Criminal Judicial Action: Criminal Penalties	<p>A person convicted of willfully or negligently undertaking an act prohibited under the Water Quality Act (as listed in 75-5-605 MCA, or pretreatment standard), may be fined up to \$25,000 per day and/or imprisoned for up to a year. Subsequent convictions bring a fine of up to \$50,000 per day and/or imprisonment up to 2 years. Any person convicted of knowingly making false statements or falsifying monitoring reports can be fined up to \$25,000 and/or imprisoned for 6 months.</p>	Legal	None



FIGURE C -- STATE COMPLIANCE/ENFORCEMENT TOOLS -- NONPOINT SOURCE DISCHARGERS

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>NONPOINT SOURCE DISCHARGERS:</b> Education/Information/T.A.: NPS "I/E" Projects	The Information and Education (I/E) portion of the nonpoint source program creates educational materials to encourage management practices to eliminate nonpoint source pollution. The materials are designed to have impact statewide, but also will be used in watershed-specific circumstances. Examples include booklets, workshops, and videos. There are also programs dedicated to youth education.	staff	NA
<b>Comp. Planning/Withdrawals:</b> NPS Watershed Projects	Nonpoint Source (NPS) watershed projects demonstrate the application of Best Management Practices (BMPs) in a medium-sized watershed (8-30 miles in length). Projects have included 80-90% of the landowners within the watershed. The opportunity for a 60% cost-share for the BMPs implemented is offered as a financial incentive to participate. Twelve such projects were undertaken between 1990 and 1994.	staff	3
<b>Permits/Certifications/Bonds:</b> Short-Term Exemption ("3A Exemption") from Water Quality Standards  401/404 Permits	The department may authorize short-term exemptions from certain water quality standards for necessary short-term construction or hydraulic projects which may have short-term water quality impacts. Typically, these projects do not require a MPDES permit, but one may be required if land is disturbed (i.e. > 5 acres, or 1 acre close to aquatic site). Program staff are participate in the preparation of permits under the federal Clean Water Act.	Prog. Sup. staff	15 4
<b>Monitoring/Inspections:</b> (None)			
<b>Admin. Incentives/Notices/Orders:</b> Warning/Compliance Letter	(See description in Figure B.)	staff	+ 15
<b>Admin. Penalties/Sanctions:</b>	(See description in Figure B.)	Enf. Staff	unk.
<b>Civil Judicial Action:</b>	(See description in Figure B.)	Legal	unk.
<b>Criminal Judicial Action:</b>	(See description in Figure B.)	Legal	unk.

sources: DHES, 1994; EQC, 1995; Pilcher, 1996; Shewman, 1996; Horpestad, 1996; Ryan, 1996; Bahls, 1996.

**8. History of Compliance.** Trends in compliance with surface water-related rules and requirements are described below, by category.

According to program staff, compliance with **nondegradation** requirements is fair; attempts at compliance are being made. The real estate community has expressed the opinion that related requirements are burdensome. There have been no applications for Authorizations to Degrade under the current law (a few were granted prior to recent legislative changes), so trends in compliance with Authorizations to Degrade cannot be assessed.

Compliance with **general surface water regulations and point source discharge** requirements is also fair. As shown below, there appears to be a slight downward trend in the number of MPDES permittees with effluent violations.

**MPDES Permits with Effluent Violations, by Year and Ownership**

<u>Year</u>	<u>Public Facilities</u>	<u>Private Facilities</u>	<u>Total Sites with Violations</u>	<u>Total Permitted Sites</u>
1990	64	17	81	400*
1991	61	18	79	
1992	55	18	73	
1993	59	20	79	
1994	56	21	77	
1995	47	19	66	

\* This figure has remained constant, +/- 10, for the past five years.

source: Shewman, 1996.

The Stormwater Program is only three years old, so compliance figures are not very useful in assessing trends. Program staff estimate that about 20% of the permitted facilities violate the regulations in a year. They also note that the situation has greatly improved, due to better understanding and compliance by those affected, especially related to highway facilities.

**9. "Violations."** When informal enforcement actions fail to achieve compliance, individual professional staff will initiate formal enforcement. Using the program's *Enforcement Response Guide*, these individuals will determine a recommended enforcement response. The guide contains a series of charts which match categories of violations, frequencies of violations, and seriousness of violations to a range of recommended enforcement responses.

On a monthly basis, each technical program holds a meeting to discuss enforcement requests with the program manager. For any violations determined to require formal enforcement action, the program will prepare a Case Ranking Form to assign a numerical value for each violation. After comparison of numeric values for all violations, the program will identify the violations to be referred to the Division Review Team for further consideration.

Once a month, representatives of each program review cases recommended for formal enforcement, and recommend any formal enforcement action (i.e. Administrative Order, judicial action). Any recommendations that are denied by the director can be resubmitted, but staff must continue to try to

resolve the violation through informal enforcement activities.

As noted in the "tools" matrix, operators may be temporarily out of compliance, but, generally, if they correct a violation within 7 days of notification, no further action is pursued. For more serious violations, or if a pattern of noncompliance develops, more escalated enforcement is undertaken. The division incorporates EPA's definitions of "significance" into its program, including "trigger level" exceedences of specific water quality parameters, and repeat violations. The division has three categories of violations, as described below:

**De Minimus** - a violation that is discovered through 3rd-party complaint, and 1) has low potential for harm to human health and the environment, 2) occurs at a facility or location where there is no history of the same or similar violations during the previous three years, 3) either was corrected within seven days from the date the violation occurred or the responsible party has agreed in writing to correct the violation within seven days after being notified, and 4) there is no compelling policy reason (such as program integrity) to pursue further enforcement action.

**Emergency/Imminent Health or Environmental Risk** - is a violation that has an immediate and serious potential for harm to human health or the environment and requires an immediate response.

**Routine Response** - is a violation that are neither of the above.

During a typical year, the Water Quality Division issues approximately 325 letters of violation: about 150 are for general water quality violations, about 160 are related to point-source discharges (100 for MPDES violations and about 60 related to stormwater), and about 15 are related to nonpoint source discharges. Of the total letters of violation noted above, about 20 are raised to the level of formal enforcement (i.e. go beyond the letter and informal negotiation phase).

Regarding MPDES permits, smaller municipalities and industries tend to violate more often than the larger ones. Larger ones, if expanding, run into problems when they start to reach their limits, unless they upgrade. Larger dischargers also typically have more resources to devote to compliance than do smaller dischargers.

Information on 1995 Water Quality Division violations (related to surface water) is shown below.

#### 1995 Surface Water Violations, by Type and Status

##### **Pending in '95:**

The Water Quality Division has a backlog of about 115 enforcement requests that it is working through. Of those, 60%, or about 70 of them, relate to the programs covered in this section of the program summary. Others related to drinking water or sanitation in subdivisions, which are covered in other areas of this report.

Last June, the division adopted Temporary Policy Guidance for the Management of the Formal Enforcement Case Backlog (Robinson, 1995). This policy established criteria under which the Department is willing to forego further formal enforcement action. This applies only to those situations where the violator is now back in compliance with all regulations. It requires a closure letter be sent to the responsible party informing them of the past violation and of the department's intent to close the file as long as compliance continues. Any ongoing violations will be considered in accordance with the Compliance and Enforcement Manual.

##### **Issued in '95:**

The preceding matrices provide counts of the number of times specific informal or formal

enforcement actions were taken in 1995. A high number of violations, a short study timeframe, and limitations to accessing information, combined to prohibit (at this time) the level of detail on surface water-related violations that is provided for violations in other programs. If there is significant interest from reviewers, and cooperation from program staff, additional information can be provided at a later date. Program staff, however, were able to provide a list of the formal enforcement actions pursued in 1995. Those related to surface water are listed below.

#### 1995 Surface Water Formal Enforcement Actions, By Type and Status

<u>Type of Operator</u>	<u>Desc. of Violation</u>	<u>Penalty Assessed</u>	<u>Status at Year End</u>	<u>Significant Violation?</u> <sup>1</sup>
Placer Miner	Numerous violations	No	Enjoined	
Timber Company	Water Qual. Stds. Violation	\$3,000	resolved	
Timber Company	Water Qual. Stds. Violation	\$7,000	resolved	
Food Processor	Discharge of Untreated Waste	\$20,000	resolved	
City	Alleged bypass into river	\$75,000 <sup>2</sup>	pending	
Agency/Association	Excessive Sediment Disch.	No <sup>3</sup>	resolved	

Notes:

- <sup>1</sup> This program does not use formal significance criteria for penalty evaluation. However, only serious violations receive formal enforcement authority.
- <sup>2</sup> Consent decree included not only the penalty, but \$250,000 in "supplemental environmental projects" (i.e. community service investments).
- <sup>3</sup> The consent decree required corrective action and a commitment to implement a number of water quality enhancement and compliance measures at an estimated cost of several hundred thousand dollars.

source: Pilcher, 1996.

**Discovery of Violations.** Most general, surface water-related violations of the Water Quality Act are discovered through citizen (third-party) complaints. Most surface water violations related to MPDES permits are discovered through review of permittee reports. Permittees typically also self-report such violations. For stormwater, most violations are found through complaints or compliance inspections, since the permits do not contain numerical effluent limitations. Non-point violations are typically found through citizen complaint.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
General	unk.	unk.	unk.	unk.	unk.
PS Dischargers:					
MPDES	116	66	<sup>1</sup>	35	15
Stormwater	72	12	<sup>1</sup>	30	30
NPS Dischargers	unk.	unk.	unk.	unk.	unk.

Notes:

- <sup>1</sup> Most permittees who have a violation evident in their monitoring reports also self-report these violations, and often discuss methods to avoid similar problems in the future.

source: Pilcher, 1996; Shewman, 1996.

Program staff note that much of their current enforcement priorities are driven by third-party complaints, and provided the following summary of 1995 complaints and their status:

**1995 Summary of Citizen Complaints Related to Water Quality**

<b>Total Number Received</b>	<b>189</b>
<b>Number not valid or insufficient evidence to validate</b>	<b>11</b>
<b>Number transferred to other agencies</b>	<b>14</b>
<b>Number referred to Division Programs, by program:</b>	
Ground water	29
Stormwater	10
MPDES Permits	9
Technical Studies	6
Safe Drinking Water	8
Ecosystems Management	20
Subdivisions	3
<b>Number pending further review at year end</b>	<b>79</b>

source: Pilcher, 1996.

**10. Considerations in Calculating Penalties.** The Water Quality Division informs all (except "de minimus") violators of the maximum daily penalties they could be assessed. The Montana Water Quality Act allows the DEQ to seek a civil penalty not to exceed \$25,000. Each day of violation constitutes a separate violation.

The division's *Compliance and Enforcement Manual* includes the EPA's approach to calculating penalties under "settlement" conditions; penalties will only be calculated if the department is seeking formal enforcement action. If formal action is to be pursued, then, penalties are calculated based upon the following formula:

**Penalty = Economic Benefit + Gravity +/- Gravity Adjustment Factors - Litigation Considerations - Ability to Pay - Supplemental Environmental Projects**

Terms included in the formula are described as follows:

- (+) **Economic Benefit** - which uses the EPA's "BEN" model to calculate the amount required to put the violator in the same financial position as they would be if they had complied on time.
- (+) **Gravity** - which uses a "points" approach to quantify the seriousness of the violation upon, and calculated for each month of violation.
- (+/-) **Adjustment Factors** - which allows the "seriousness" assessment described above to be adjusted for small facilities, quick correction, or bad faith/excess delays.
- (-) **Litigation Considerations** - adjustments made to the requested penalty based upon the potential strength of the case in the eyes of a court.
- (-) **Ability to Pay** - based upon the violator demonstrating inability to pay.
- (-) **Supplemental Environmental Projects** - these are basically "community service" projects that

can be approved in lieu of monetary payments.

The EPA policy provides examples and worksheets to calculate settlement penalties.

**11. Resolution of Noncompliances.** Program staff do not have any easily retrievable data related to trends in the number and method of resolution of noncompliances over time. From a qualitative standpoint, however, program staff feel that resolution of general water quality violations, MPDES and stormwater permit violations, and resolution of nonpoint source violations is relatively good. However, program staff also feel that the timeliness and responsiveness of division enforcement actions should be improved overall. Program staff hope that the addition of newly authorized staff and the full implementation of the division's enforcement manual will allow a more effective and efficient enforcement program.

**12. Current Compliance Priorities.** the Water Quality Division has identified the following priorities related to surface water regulation in Montana:

- Full staffing of the Enforcement Section;
- Timely investigation of “third party” complaints;
- Timely and effective formal enforcement response in accordance with the Compliance and Enforcement manual.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** The U.S. Environmental Protection Agency delegated Clean Water Act authority to the state of Montana in 1974.

Under the federal Clean Water Act, a person who wishes to discharge waste materials from a point source into waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit. While the U.S. EPA delegated wastewater discharge permitting authority to the state in 1974, a controversy remains over who may issue discharge permits for facilities located on lands owned by nontribal members within reservations. Until this matter is resolved, both the DEQ and EPA are issuing permits for these facilities

**Partnerships.** Some individual permittees provide funds for department analysis of specific conditions or areas. For the 1996-97 biennium, ARCO will provide approximately \$25,000 for Clark Fork River water quality analyses. The results will be used to judge the effectiveness of cleanup efforts in the Clark Fork Basin.

**Delegated Authority.** Currently, three local water quality districts have been established, covering Lewis and Clark County (Helena area), Missoula County, and Butte. Gallatin County is currently considering the creation of a local water quality district. The DEQ has a good working association with existing local water quality districts. They are able to address local issues that the DEQ could not address.

Also, included in the Water Quality Division funding is sufficient authority to contract over \$650,000 each fiscal year with nonprofit entities for water quality management activities. At least 60% of this

annual amount must be contracted to conservation districts. No more than 10% of this annual amount may be spent on studies.

# MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS

The Department of Fish, Wildlife and Parks (FWP) is responsible for managing Montana's fish, wildlife and recreational resources and providing outdoor recreational opportunities. Department divisions, and fiscal and staffing resources, are shown below.

<u>Bureau/Division</u>	<u>Budget</u>		<u>Staff (FTEs)</u>	
	<u>FY 96</u>	<u>% of Total</u>	<u>FY 96</u>	<u>% of Total</u>
Administration and Finance Division	3,783,000	10.0%	50.1	9.2
Field Services Division	3,453,000	9.1	36.1	6.7
Fisheries Division	6,916,000	18.3	107.6	19.8
<b>Law Enforcement Division</b>	<b>5,582,000</b>	<b>14.7</b>	<b>96.2</b>	<b>17.7</b>
Wildlife Division	7,906,000	20.9	96.9	17.9
Parks Division	5,094,000	13.5	86.4	15.9
Conservation Education Division	1,910,000	5.0	22.3	4.1
Department Management	<u>3,213,000</u>	<u>8.5</u>	<u>46.9</u>	<u>8.6</u>
<b>TOTAL</b>	<b>\$37,857,000</b>	<b>100.0%</b>	<b>542.4</b>	<b>100.0%</b>

source: LFA, 1995.

The Environmental Quality Council reviewed the Department of Fish, Wildlife & Parks for possible inclusion in this study. Due primarily to time and staff limitations, the Council decided to not conduct a formal review of the department's compliance and enforcement programs and efforts. A detailed analysis for the department is not included in this report.

Instead, the EQC sent the department the standard list of questions and on several occasions, various program staff provided oral and written testimony and responses to specific requests. The contemporary issue of greatest concern to the Council was that of illegal fish and wildlife introductions in Montana. The discussion of that issue is included in the EQC working files and is available on request.



# MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The Department of Natural Resources and Conservation (DNRC) is responsible for the management, development, conservation, and use of some of Montana's natural resources. Department divisions, and fiscal and staffing resources, are shown below.

<u>Bureau/Division</u>	<u>Budget</u>		<u>Staff (FTEs)</u>	
	<u>FY 96</u>	<u>% of Total</u>	<u>FY 96</u>	<u>% of Total</u>
Central Management Program	1,788,000	7.1	20.0	4.1
Land Administration Program	1,617,000	6.4	30.5	6.3
Centralized Services Division	1,274,000	5.1	22.0	4.5
<b>Oil and Gas Conservation Division</b>	<b>1,058,000</b>	<b>4.2</b>	<b>18.0</b>	<b>3.7</b>
<b>Conservation and Development Division</b>	<b>1,443,000</b>	<b>5.7</b>	<b>18.5</b>	<b>3.8</b>
<b>Water Resources Division</b>	<b>5,633,000</b>	<b>22.4</b>	<b>112.5</b>	<b>23.2</b>
Reserved Water Rights Compact Commission	505,000	2.0	11.0	2.3
<b>Forestry Program</b>	<b>11,780,000</b>	<b>46.9</b>	<b>251.6</b>	<b>52.0</b>
<b>TOTAL</b>	<b>\$25,099,000</b>	<b>100.0%</b>	<b>484.1</b>	<b>100.0%</b>

source: LFA, 1995.

The DNRC contains eight divisions, four of which are included in this study. Divisions with environmental compliance/enforcement programs are described below.

## CONSERVATION AND RESOURCE DEVELOPMENT DIVISION

The mission of DNRC's Conservation and Resource Development Division is to provide technical, administrative and financial assistance to local governments, state agencies, and private citizens for the conservation, development, protection, and management of the state's natural resources. Budget, funding source, and staffing information for the division and its programs is provided below.

### Conservation District Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Conservation District Program.

Primary constitutional and statutory authorities (see Appendix B):

- 76-15-102. Policy. It is state policy to conserve soil and soil resources to control and prevention soil erosion and other for other benefits.
- 76-15-105. Duties of the department. The department shall offer assistance to conservation districts, keep district supervisors informed, coordinate district programs, secure the cooperation and assistance of the United States

and of agencies of this state in the work of the districts, disseminate information, encourage the formation of districts in areas where their organization is desirable.

Supplemental and/or related state authorities:

- None

Related federal authorities:

- None

Specific enforcement authority:

- None

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based on the above-referenced guidance, the Conservation District Program has identified the following program goals:

- |  |   |
|--|---|
| 1. Provide administrative, technical, financial and legal assistance to all conservation districts.                            | 8. Assist in administering the Private Forest Stewardship Assistance Program.   |
| 2. Coordinate conservation district activities with state and federal agencies.  | 9. Assist Resource Conservation and Development Areas in addressing rural development on a regional basis.                                |
| 3. Provide grants to CD's for projects satisfying natural resource management mandates.  | 10. Organize natural resource conservation education activities.  |
| 4. Assist with pollution control, education and watershed demonstration projects.  | 11. Assist in watershed planning.   |
| 5. Provide riparian management education and information to landowners.  | 12. Assist in sustainable and small scale agriculture activities.   |
| 6. Coordinate rangeland resource programs and management efforts with private landowners, state agencies and federal agencies. | 13. Participate in the state-wide conservation district capacity building effort to assist conservation districts in building leadership. |
| 7. Coordinate private and public natural resource management efforts.  |   |

**3. Program Activities.** Five members of the division staff work basically full-time on conservation district issues. The division does not have the staff to assign individuals to one program. With a total of 58 districts covering the state, issues arise continuously. Individual staff assist several conservation districts with separate and different issues and thus must develop a certain level of expertise in many areas. Types of projects include; watershed projects, water quality activities, rangeland resource management, saline seep, streambank erosion control projects, timber management, youth education, City-County Planning Board coordination, mining impact activities, water reservation activities, weed control, urban activities, rural economic development, project funding, etc.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
Overall Conservation District Program Activities	\$1,017,024	5.0	12	Not Applicable	N/A	N/A

**Fees and Charges.** The Conservation District Program has no authority to impose any fee, penalty, or other charge on members of the regulated community.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees:	Not Authorized		
Permit Renewal Fees:	Not Authorized		
Additional MEPA Fees:	Not Authorized		
Noncompliance Penalties:	Not Authorized		
TOTAL:		\$00.00	

**4. Regulated Communities.** The Conservation District Program interacts with one clearly defined regulated community--conservation districts--authorized under 76-15-101, MCA *et seq.* There are 58

conservation districts covering the state. Each district is made up of 5 locally elected supervisors and 2 supervisors appointed from the incorporated cities within the district boundary. The number of districts is projected to stay the same.

**5. Philosophical Approach to Compliance.** DNRC staff emphasize cooperation with conservation districts and specific individuals and strives to work problems out with minimal conflict. Program staff believe that their strong emphasis on education has worked extremely well.

**6. Compliance Tools Available and Used.** The menu of tools used by the Conservation District Program to achieve their natural resource/environmental mandates is shown beginning on the next page. There is very little regulatory authority given to this program. What authority exists is included in section 76-15 parts 1 through 8, MCA. Mostly the statutes reference department responsibilities which translates into a certain amount of authority. The strongest authority program staff have is the department's role in the removal of a supervisor. This is very seldom used. The program stresses cooperation and the districts rely heavily on program advice and follow it closely. In a way the program staff believes that their advice has become the over riding authority even though they do not have direct authority by law.

**7. Incentives for Compliance.** According to program staff, the greatest incentive for compliance with the DNRC's rules and regulations is the capable assistance and advice the districts receive that assists them in the proper management of their programs and responsibilities. Additionally, the department passes through funding for district administrative activities if the district's mill levees do not cover costs. The department also administers the district's project grant funding.

**8. History of Compliance.** Here again, program staff emphasize that neither they nor the districts have relied heavily on formal enforcement. However, with increases in population come increased pressures on the state's natural resources and problems on the district level are definitely increasing. Many issues the districts are involved in are sensitive. Also, with the growing interest in local control, districts are increasingly looked at as an effective tool to implement programs on the local level.

**9. "Violations."** Again program staff emphasize that they do not have much enforcement power and the program has never taken a formal enforcement action. The informal actions taken focus on education and technical assistance.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- CONSERVATION DISTRICT PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/T.A.:</b>	Education and technical assistance are routine duties of program staff.	All program staff	Routine
<b>Comp. Planning/Withdrawals:</b> Not authorized			
<b>Permits/Certifications/Bonds:</b> Not authorized			
<b>Monitoring/Inspections:</b> Not Authorized			
<b>Administrative Notices/Orders:</b> Removal of District Supervisor	A supervisor may be removed by the DNRC upon notice and hearing for neglect of duty or malfeasance in office.	DNRC Director	0
<b>Admin. Penalties/Sanctions:</b> Not authorized			
<b>Civil Judicial Action:</b> Not authorized			
<b>Criminal Judicial Action:</b> Not authorized			

**Discovery of Violations.** Violations are identified through concerns expressed to the DNRC by district directors or private individuals.

<u>Group</u>	<u>Violations Discovered, by method, 1995</u>			<u>Citizen Complaint</u>
	<u>Agency Review of TotalMonitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	

Specific information not available

**10. Considerations in Calculating Penalties.** The Conservation District Program does not have a formal written enforcement policy or penalty calculation policy. The DNRC would consider the frequency of violations in an enforcement action but violations are rare and this has not occurred.

**11. Resolution of Noncompliances.** When concerns or issues are brought to the attention of program staff, they either respond directly relying on their experience and expertise or on their staff attorney or outside experts. Actual enforcement actions of local regulations are handled by the local districts when individuals are involved.

**12. Current Compliance Priorities.** Priorities and goals are the same. The over riding priority is to provide professional, timely service to all districts.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** No entity outside of the DNRC has oversight of this program.

**Partnerships.** The division works very closely with all state, federal, and local governments, and other organizations that are involved in natural resource management activities. Partnership building with these groups is an important ongoing effort within the division.

**Delegated Authority.** District regulations are adopted and enforced by the district as provided by statute. The department does not delegate any authority to the districts.

# Grazing District Program

**1. Constitutional and Statutory Goals.** The following list provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Grazing District Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Grass Conservation Act**, 76-16-101, MCA *et seq.* requires the DNRC to assist in carrying out the purposes of the chapter, act in an advisory capacity with the boards of county commissioners, and supervise and coordinate the formation and operation of grazing districts. The DNRC may also act in an advisory capacity with boards of county commissioners.
- 76-16-104, MCA. The DNRC shall act in an advisory capacity with County commissioners to carry out the Act.
- 76-16-105, MCA. The DNRC may require the appearance of any person needed, hold hearings

regarding grazing districts, require needed reports from districts, etc.

Supplemental and/or related state authorities:

- None

Related federal authorities:

- None

Specific enforcement authority:

- 76-16-325
- 76-16-211

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based upon the above-referenced guidance, the Grazing District Program has identified the following program goals:

1. Provide advice and assistance to grazing districts as requested regarding operation under state law.
2. Provide standard forms for grazing district operations and collect annual financial reports.
3. Supervise grazing district operations, including processing of appeals to grazing district decisions,
4. Cooperate with and provide advice to grazing districts and state and federal agencies regarding conservation and use of grazing lands.

formation and dissolution of districts, and other activities outlined in statute.

**3. Program Activities.** The Grazing District Program activities include attendance at approximately 15 grazing district meetings per year to address operational issues and questions; provision of four to six legal opinions to grazing districts annually regarding district operations under state law; provision of advice and assistance to the Montana Association of State Grazing Districts at their spring and fall meetings regarding district operations; review and approval of 6 to 12 range improvement loans per year (some of which involve grazing district permittees); and ongoing participation in and occasional funding of riparian management and conservation education efforts including riparian management workshops, range tours, educational videos, etc.

Approximately 1/3 FTE split between a Resource Specialist and Administrative Support position in Miles City is available to address day to day grazing district support needs. The Conservation and Resource Development Division Administrator, the Conservation Districts Bureau Chief and a department staff attorney are provided as needed for grazing district supervision and legal issues. Since budgeted funds are limited to approximately \$12,000, grazing program support requirements are usually subsidized by other programs.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
Overall Grazing District Operations	\$12,000	.2	12	Not applicable	N/A	N/A

source: Beck, 1996.

**Fees and Charges.** The department assesses fees to grazing districts of 10 cents per animal unit based on the number of units per year for which the districts authorize permits. 76-16-106, MCA authorizes fees of up to 15 cents per animal unit.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees:	Not Authorized	0	
Permit Renewal Fees:	Not Authorized	0	
Additional MEPA Fees:	Not Authorized	0	EIS/EA prep.
Non-Compliance Penalties:	Not Authorized	0	
Animal Unit Fees:	Varies	\$12,000	General Support <sup>1</sup>
TOTAL:		\$12,000	

Notes:

1. These funds are used to provide administrative support to districts, printing grazing district forms, and providing legal advice to districts.

**4. Regulated Communities.** The Grazing District Program interacts with one clearly defined regulated community--grazing districts--provided for under 76-15-101, MCA *et seq.* There are currently 28 operational grazing districts located in the eastern half of Montana. Two districts are currently inactive and investigating the possibility of merging or dissolving. In recent years, several other grazing districts have inquired regarding the process for dissolution. A primary factor for the interest in dissolution seems to be the establishment of individual allotments replacing common grazing pastures in many districts. Although many districts play a strong role in grazing management within their boundaries, some have seen their roles decrease.

**5. Philosophical Approach to Compliance.** DNRC staff emphasize cooperation with grazing districts and specific individuals and they strive to work problems out with minimal conflict. Program staff believe that their strong emphasis on education has worked extremely well.

**6. Compliance Tools Available and Used.** There is very little regulatory authority given to the grazing program. DNRC compliance and regulatory authority is spelled out in 76-16-104, 105, 304, 325, and 406, MCA. Much of the department's authority over grazing districts relates to assurance that the proper process and statutes have been followed by individual districts. Examples include formation and dissolution of districts, transfers of land and grazing preferences, and amendments of bylaws. The department also has the authority to consider appeals to individual district decisions and to issue orders of compliance to districts. Ultimately, the department could temporarily assume management of a district and require election of new directors if, after a hearing, it appeared the current directors refuse to perform the duties of their office. During the last 5 years, the department has addressed one appeal, but has not intervened in direct district management or required election of new directors. The menu of tools used by the Grazing District Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- GRAZING DISTRICTS PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/T.A.:	Education and technical assistance are routine duties of program staff.	All program staff	Routine
Comp. Planning/Withdrawals: Not authorized			
Permits/Certifications/Bonds: Not authorized			
Monitoring/Inspections: Not authorized			
Administrative Notices/Orders: *Hearings, records, testimony  *District Dissolution  *Removal of officers	<p>The DNRC may hold a hearing, request records, or require the appearance of any person when the DNRC determines that there is a need for such action or upon receipt of an appeal by any person affected by the decision of a grazing district.</p> <p>The DNRC may dissolve a grazing district whenever a district ceases to function and the DNRC determines that reinstatement and future district operation is not feasible.</p> <p>If district directors refuse to perform their required duties, the DNRC may, upon notice and hearing, summarily remove them and operate the district its until now officers are elected.</p>	<p>DNRC Director</p> <p>DNRC Director</p> <p>DNRC Director</p>	<p>0</p> <p>0</p> <p>0</p>
Admin. Penalties/Sanctions: Not authorized			
Civil Judicial Action: Payment of animal unit fees	The department may compel the payment of fees by the district through a writ of mandate or other appropriate remedy.	DNRC Director	0
Criminal Judicial Action: Not authorized			



**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with grazing district statutes is the value which all affected livestock producers receive from cooperative management of grazing lands of mixed ownership. Additionally, low interest range improvement loans are available to producers who implement sound range management practices, including cooperative practices which involve grazing lands of mixed ownership.

**8. History of Compliance.** Grazing district complaints usually stem from individual's concerns over grazing district administration of grazing preferences within the district. Most concerns or complaints are addressed by providing verbal or written clarification regarding direct statutory requirements or legal opinions as to interpretation of statute. State and federal land management policies have had increasing impact on grazing limitations and requirements.

Issues relating to grazing on lands of mixed ownership have evolved over the years. Initially, grazing management was undeveloped and grazing districts were challenged with adjudication of grazing privileges on intermingled federal, state and private lands based on determination of viable base ranch property. Today, state and federal agencies have assumed a much larger role in managing grazing use on their respective properties. To a large degree, large pastures grazed in common have been replaced with allotments grazed by only one permittee. As a result, grazing districts increasingly place their attention on coordination with state and federal land managers regarding government grazing policy instead of coordination of day-to-day grazing activities within large common pastures. In some cases the original grazing district statutes do not accurately reflect modern grazing practices.

**9. "Violations."** The division receives complaints or concerns on a regular basis. Most issues can be resolved by phone or in writing. No formal enforcement action has been required.

**Discovery of Violations.** Violations are identified by concerns expressed to the DNRC by concerned district directors or private individuals.

Violations Discovered, by method, 1995				
Group	Total	Agency Review of Monitoring Reports	Self-Reporting of Violation	Citizen Complaint

Specific information not available.

**10. Considerations in Calculating Penalties.** The Grazing District Program does not have a formal written enforcement policy or penalty calculation policy. The DNRC would consider the frequency of violations in an enforcement action but violations are rare and this has not occurred.

**11. Resolution of Noncompliances.** No enforcement action has been taken. The department's authority is fairly limited except in specific areas. Most issues are resolved by action of the appropriate Grazing District Board. Program staff are often involved with the board in deciding the appropriate action.

**12. Compliance Priorities.** Agency staff have identified the following priorities for the Grazing District Program.

- Provide legal opinions and advice as requested by districts.
- Review and approve exchanges and transfers as requested.
- Process requests for mergers and dissolutions of districts as requested.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** No entity outside of the DNRC has oversight of this program.

**Partnerships.** The DNRC works cooperatively with the Bureau of Land Management and the Montana Association of State Grazing Districts. The division also works closely with all natural resource/land management agencies. These would include the Bureau of Land Management, Forest Service, Natural Resource Conservation Service, Fish Wildlife and Parks, local governments and Conservation Districts.

**Delegated Authority.** None.

## FORESTRY DIVISION

The Forestry Division is responsible for planning and implementing forestry programs statewide. Forestry responsibilities include protecting Montana's natural resources from wildfire, regulating forest practices, and providing a variety of services to private forest landowners. Specific programs include:

**Fire and Aviation Management:** Protecting 50 million acres of state and private forest and watershed lands from wildfire through a combination of direct protection and County support.

**Forest Practice Regulation:** Enforcing Montana's streamside management zone regulations and monitoring the voluntary best management practices program on all forests on Montana.

**Administering Montana's Fire Hazard Reduction Law:** Ensuring that the fire hazard created by logging and other forest management operations on private forest lands is adequately reduced, or that additional fire protection is provided until the hazard is reduced.

**Providing Forestry Services:** Providing technical forestry assistance to private landowners, businesses and communities.

**Tree and Shrub Nursery:** Growing and selling seedlings for conservation and reforestation plantings on state and private lands in Montana.

Budget, funding source, and staffing information for the Forestry Division is provided below. The programs noted in **bold** type contain regulatory programs, thus are included in this study.

<u>Program/Activity</u>	<u>Funding Source, FY 96</u>					<u>FTE</u>
	<u>General</u>	<u>State</u>	<u>Landowner</u>		<u>Total</u>	
	<u>Fund</u>	<u>Special</u>	<u>Assessment</u>	<u>Federal</u>	<u>Funds</u>	
<b>Fire and Aviation Management</b>	3,512,200		1,717,900	492,200	5,722,300	129.5
Nursery		230,100			230,100	7.3
<b>Private Slash Removal</b>	137,900	300,000			437,900	12.3
Other Services	834,900			100,000	934,900	8.3
<b>Service Forestry</b>	467,800			484,300	962,100	17.0
<b>TOTAL (FY 96)</b>	4,952,800	530,100	1,717,900	1,076,500	8,277,300	174.5
 <b>TOTAL (FY 90)<sup>1</sup></b>	 5,192,100	 1,259,100	 1,125,700	 432,900	 8,009,800	 225.2

Notes:  
 1 FY 90 budget information included the Forest Management Program. This program was recently transferred to the DNRC's Trust Land Management Division

source: Artley, 1996.

## Legislative History

Events important to the compliance/enforcement elements of the Service Forestry Program are summarized below. Program staff were unable to provide this information for the Fire and Aviation

Program before study completion.

- 1910 The Biennial Report of the State Forester first mentions need for fire hazard reduction.
- 1913 State Forester recommends some form of slash burning restrictions
- 1919 Legislature passes bill requiring slash/brush burning within 1 year of creation
- 1927 Slash law modified to include practices to reduce negative effects of burning on tree regeneration, and to require hazard reduction work to cost \$0.15 per thousand board feet (mbf) or less
- 1929 All hazard reduction work was done by the State for the fifteen cents per mbf
- 1941 Slash fee raised to \$0.25 per mbf
- 1947 Slash fee raised to \$0.75; law revised to be forerunner of current law.
- 1950s-
- 1970s State reduces its role in doing on-the-ground work; bond rate gradually rises.
- 1976 State gets out of on-the-ground hazard reduction work all together, except for necessary enforcement actions
- 1979 Hazard reduction bond rate reaches \$6.00 per mbf (same as current rate)
- 1989 Legislature passes HB 678, requiring the Department to provide Best Management Practices (BMP) information to private forest owners and operators to help protect water quality.
- 1991 Legislature passes the Streamside Management Zone (SMZ) law
- 1993 SMZ rules become effective

# Service Forestry Program

The Service Forestry Program provides services to various client groups to help them comply with state forestry laws and achieve their own forestry-related objectives. Those served include individuals, local governments, corporations, other agencies, and the general public. Services include the following:

- administering state laws for control of timber slash on private lands;
- administering state laws for control of forest practices within Streamside Management Zones on federal state and private lands;
- providing information on Forestry Best Management Practices;
- giving technical advice on private forest management, urban tree management and insect and disease control; and
- producing tree and shrub seedlings for conservation plantings and reforestation.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of DNRC's Service Forestry Program.

Primary constitutional and statutory authorities (see also Appendix B:

- **Montana Constitution, Art. II, sec. 3** states that all persons have a right to a clean and healthful environment. **Art. IX** refers to maintaining and improving a clean and healthful environment, protecting the environmental life support system, and preventing unreasonable depletion and degradation of natural resources.
- **The Hazard Reduction Act (Slash Law)** (MCA 76-13-401, et. seq.) directs the department to oversee slash treatment operations and to certify that abatement of hazards has occurred.
- **Best Management Practices Notification Act (BMP Law)** (MCA 76-13-104, et. seq.) require notification of proposed forest practices on private land, and subsequent provision of BMP information to the proponent.
- **Stream Management Zone Act (SMZ Law)** (MCA 77-5-301, et seq.) provides standards for the forest practices in SMZs on federal, state, and private land in Montana and authorizes the department to enforce standards.

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Montana Stream Protection Act (SPA)**
- **Montana Floodplain and Floodway Management Act**
- **Montana Natural Streambed and Land Preservation Act**
- **Lakeshore Protection Act**
- **Montana Water Quality Act**

Related federal authorities:

- **National Environmental Policy Act (NEPA)**
- **Federal Clean Water Act**

Service Forestry administrative rules:

- ARM 26.6.601-.610 (SMZ only)

Specific enforcement authority:

- MCA 76-13-410, 76-13-412, 76-13-413 (for HRA Law)
- MCA 77-5-305 (for SMZ Law)
- ARM 26.6.610-610 (for SMZ law)

Primacy and jurisdictional agreements: None

**2. Program Goals.** The Service Forestry Programs provide services to various client groups to help them comply with state forestry laws and achieve their own forestry-related objectives. Goals, by program, are listed below:

## Timber Slash Program Goals:

1. All fire hazard caused by logging residues,

road construction, or other cuttings on private forest lands are abated to a level that meets

- DNRC standards.
2. DNRC provides timely, consistent and fair services of overseeing slash-treatment and certifying compliance.
  3. All purchases of forest products are in compliance with legal provisions for reporting purchases withholding bonds and fees, and transmitting money to DNRC.

**Forest Practices Program Goals:**

1. Montana loggers and forest landowners avoid damage to soil, water and wildlife by effectively applying Best Management Practices (BMPs) to forestry operations.

**Forest Practices Program Goals (cont.):**

2. Forestry operations within Streamside Management Zones (SMZs) are conducted in a manner which conserves the integrity of SMZs and avoids unnecessary damage to soil, water and wildlife habitat.
3. DNRC services for reviewing operating plans, providing information about forest practices, and overseeing forestry operations in SMZs are timely, consistent and fair.
4. DNRC education projects concerning forest practices cause all of Montana's forest landowners and operators to understand forest resource protection concepts and be able to apply those concepts.

Program staff note that goals can be best understood through examination of the DNRC's "Standards and Guidelines," located in the Timber Slash and Forest Practices manuals, respectively. A "standard" is a level of performance that DNRC employees must meet: they are dictated by state laws and administrative policy. A "guideline" is the way the Bureau suggests that a DNRC employee meet or satisfy the standard.

The Biennial Program Plan contains the overall goals of the program. What the program hopes to accomplish, how it hopes to accomplish it, and when it should be accomplished are all addressed in this plan.

The Annual Work Plan assigns specific tasks listed in the Program Plan to certain individuals and requires those individuals to report on the progress they have made in each of their assigned tasks. At mid-year, and at the end of the fiscal year, reports are compiled to show what has been accomplished, what remains to be accomplished, and also reflects budgetary income and expenditures. The Fiscal Year End Report is the starting place for determining the next Biennial Program Plan.

**3. Program Activities.** The three major Service Forestry Program activities are: 1) hazard reduction (HRA), 2) best management practices (BMPs), and 3) streamside management zones (SMZs). Program staff are located in the main office in Missoula, as well as 15 units (field offices). Each field office reports to one of 6 Land Offices: Central (Helena), Eastern (Miles City), Northeastern (Lewistown), Northwestern (Kalispell), Southwestern (Missoula), and Southern (Billings). The resources available for these activities, and demands placed upon those resources, are described in more detail below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.<sup>2</sup></u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/Site<sup>3</sup></u>	<u>Avg. # of new proj./yr<sup>2</sup></u>
Haz Red. Agrmnts. <sup>1</sup>	\$429,000	11.9	6.3	6,100 <sup>2</sup>	NA	2,500 <sup>3</sup>
Best Mgt. Practs <sup>4</sup>	206,900	3.5	3.6	6,100	NA	2,500
Stream Mgt. Zone <sup>4</sup>	56,100	1.5	2.8	1200	NA	620

Notes:

- 1 35% of total HRA funds come from loggers and landowners, collected at the point of sale; the remainder is general fund monies.
- 2 1,950 of the total 1995 ongoing Hazard Reduction Agreements (HRAs) were Master HRAs.
- 3 Slightly less than 1/3rd of the average number of new HRAs annually are Master HRAs.
- 4 100% of these funds are General Fund monies.

source: Artley, 1995; Lennon, 1996.

**Fees and Charges.** By statute, Service Forestry Program revenues from fees and charges are deposited into the Slash Special Revenue account. The amounts of the nonvariable fees are set in statute. Additional information on fees and charges is presented in the table below.

<u>Type</u>	<u>Authorized Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
<b>Permit Fees:</b>			
Haz. Red. Agreement Issuance Fee	\$25	\$41,000	Program Funding
Master HRA Issuance Fee	varied <sup>1</sup>	17,600	Program Funding
<b>Renewal Fees: (none)</b>			
<b>Annual Fees: (none)</b>			
<b>Noncompliance Penalties:</b>			
SMZ Penalties	\$100-\$1,000	\$17,450	Forestry Stewardship Activities
<b>Other:</b>			
Forestry Extension Service Fee	\$0.15/mbf <sup>2</sup>	<u>\$87,500</u>	Extension Services
<b>TOTAL:</b>		<b>\$163,550</b>	

**Notes:**

- 1 Assessed at 100% of department cost to administer Agreement; contractor is billed annually to collect.
- 2 15 cents per 1,000 board feet is assessed of the contractor or purchaser of forest products from a timber sale. The assessment cannot exceed \$20,000 per year.

source: Artley, 1996; Lennon, 1996.

**4. Regulated Communities.** The Service Forestry Program typically deals with three regulated communities, each subject to a different law, and a great deal of overlap between them. These regulated communities are described below.

The regulated community under the **Hazard Reduction Act** includes anyone (1) clearing rights of way (except temporary logging roads, (2) cutting forest products, building haul roads, and/or carrying out timber stand improvement activities on private lands. Purchasers of such forest products are also part of the regulated community in that they must insure the persons they are purchasing forest products from have complied with hazard reduction regulations.

Persons encouraged to use **Best Management Practices** are those involved in timber sale planning and harvest, associated road construction, and other related activities. The Department estimates there were approximately 6,000 persons engaged in such activities in 1995, mostly in western Montana.

Persons subject to the requirements related to **Streamside Management Zones** include those conducting timber sale activities in areas where such activities should be modified due to potential effects on aquatic resources. The Zone extends at least 50 feet (slope distance) from the ordinary high water mark of a water body, and further where there are wetlands or where steep or erosive soils require additional width.

**5. Philosophical Approach to Compliance.** The DNRC philosophy regarding compliance is that information, education, and assistance are the means by which most resource protection will be obtained. Aggressive follow-up of enforcement actions will result for the cases when the natural resource has been threatened and information/education did not bring the desired result.

**6. Compliance Tools Available and Used.** Compliance is ensured through a combination of inspections, area monitoring, education, and performance bonds. In addition, training workshops have been held throughout the state and the timber industry has been very active in promoting these efforts. Public complaints notifying the state of possible violations also play a role.

The Service Forestry Program has written policies for inspection compliance, as well as enforcement actions, that are contained in Standards and Guidelines manuals for each program.

The menu of tools used by the Service Forestry Program to achieve their natural resource/environmental mandates is shown beginning on the next page. Abbreviations used in the “Authority” column refer to the following:

Admin..	Division Administrator
Field	field staff
staff	program staff
NA	Not Applicable
unk.	unknown

**7. Incentives for Compliance.** For the HRA law, a unique system is in place where the landowner is watching the operator to ensure compliance and the operator is watching the mills to ensure compliance. The landowner wants the slash cleaned up. Often to an extent that exceeds state standards. If the operator fails to comply, the state is often notified. Furthermore, when the operator (logger) delivers logs to the mill, money is withheld on a per-unit basis for fees and a performance bond. When compliance is achieved, the bond is refunded to the operator. If the “slash” account has discrepancies, the operator generally notifies the state of the error. The state is then alerted of a potential compliance problem at the mills and can monitor reporting requirements with a minimum of effort.



STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARD REDUCTION (Slash)			
Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (FY 95)
<b>HAZARD REDUCTION (SLASH):</b> Education/Information/T.A.: HRA Fact Sheet Workshops	(Informational brochures are distributed at meetings, fairs, demonstrations, during personal contacts, and with BMP Receipt of Notifications.) This is a two-sided flier informing private forest land owners and operators of the need for hazard reduction and answers to frequently-asked questions. Landowners and operators opening new HRAs receive an info packet. Over the last two years, the department has held numerous training workshops around the state. They are geared toward logging professionals, mill operators, representatives of other agencies, and the general public. They are often held in cooperation with other agencies and groups, and include information on Best Management Practices (BMPs) and Streamside Management Zones (SMZs).	field/staff field/staff field	NA 2000 15
<b>Comp. Planning/Withdrawals:</b> Hazard Reduction Standards	Slash hazards must be reduced to generate no more than a 4-foot flame length (as measured through use of a computerized fire behavior model). The Department uses a booklet of photos and data of slash conditions to determine compliance with the State standard.	field	NA



**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARD REDUCTION (Slash)**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (FY 95)
<b>HAZARD REDUCTION (cont.):</b> <b>Monitoring/Inspections:</b> Monthly Purchaser Reports  Contractor Audit  Mill Audit  HRA Closure Inspections  Program Tracking	<p>Purchasers of forest products must report monthly to the state on purchases and remit withheld funds at that time.</p> <p>May be conducted to determine volume of forest products harvested by a contractor. Contractor must cooperate.</p> <p>In order to ensure compliance by purchasers of forest products, audits may be conducted on suspect (those that present frequent compliance problems) mills are provided by state and program standards.</p> <p>Most HRAs are inspected routinely for slash compliance. While on-site, inspectors also review for SMZ compliance, and may conduct BMP post-harvest review (see below).</p> <p>The department uses a variety of monitoring and reporting methods. Numbers of new HRAs, as well as status of current agreements, are continually tracked.</p> <p>Purchaser reports are received monthly and continually tracked. Reports can be generated summarizing the timber harvest in the state. Much of this information is gained through the inspection process. BMP and SMZ compliance is continually monitored through inspection process and reports can be generated on past histories of operators. Reports are also generated summarizing compliance problems and workload levels.</p>	staff  staff  staff  field	2,400    1   1,410
<b>Administrative Notices/Orders:</b> Certificate of Clearance/Bond Release  Noncompliance Letter/Call	<p>Issued upon completion of work covered under Agreement; releases contractor from further liability/responsibility under the Agreement.</p> <p>If a purchaser does not submit withheld money and required reports on or before the 15th day of the following month, the operator is notified that he/she is out of compliance, and given 15 days to submit all money and reports then due.</p>	field  field	1,410  unk.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- HAZARD REDUCTION (Slash)**

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (FY 95)
<b>HAZARD REDUCTION (cont.):</b> <b>Administrative Penalties/Sanctions:</b> State Does Work at Contractor Exp.  Withholding of Bond  Confiscation of Bond Penalties  Penalty Waiver  Lien on Products/Land	<p>If a person fails to comply with Hazard Reduction regulations, and fails to comply within 30 days after being notified to do so, the department may complete, direct, or authorize the fire hazard reduction or management at the expense of the contractor or the owner.</p> <p>Bonds can be held until operator comes into compliance, or the state decides to confiscate the bond.</p> <p>Occurs if contractor fails to comply.</p> <p>A penalty may be issued if payment and reports are not received within 15 days of issuance of a noncompliance letter. Penalty amounts are 5% of the amount due. The department may also assess interest (10%/yr.) on any unpaid balance.</p> <p>Penalty may be waived if operator demonstrates the delay in compliance was reasonable, and not due to negligence.</p> <p>The cost and expense of the fire hazard reduction or management work, plus 20% of the cost and expense of the work as a penalty, constitutes a lien upon the forest products cut or produced from the land, and on the real and personal property of contractor. If payment of the sum demanded is not made to the department within 10 days of its written demand, the department begins legal action to recover the debt.</p>	<p>field</p> <p>field staff</p> <p>staff</p> <p>staff</p> <p>Admin.</p>	<p>60</p> <p>NA 60</p> <p>5</p> <p>2</p> <p>2</p>
<b>Civil Judicial Action:</b>	<p>Court actions are pursued to ensure directives are followed and penalties are paid. They may consist of temporary restraining orders, injunctions, writs of mandate, or pursuit of liens on property or products. Proceedings are conducted in the District Court of the county wherein the land is located.</p>	Admin.	2
<b>Criminal Judicial Action:</b>	<p>Conviction of a violation is a misdemeanor; conviction carried a fine of between \$100 and \$1,000. Proceedings are conducted in the District Court of the County where the land is located.</p>	Admin.	None

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- BEST MANAGEMENT PRACTICES (BMPs)

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>BEST MANAGEMENT PRACTICES:</b> <b>Education/Information/T.A.:</b> BMP Information: - Forestry BMP Booklet - BMP video  BMP Audit Results Workshops/Training Sessions Technical Assistance	<p>Law requires state to provide BMP info and to encourage their use and implementation. Full-color; produced in 1991; 33 pages related to BMPs for roads, streamside management, timber harvest, hazardous substances, and stream crossings. Covers forestry and water quality; intended audience is forest landowners and contractors.</p> <p>Audit results are published and evaluated to determine problem areas every 2 years. (see general discussion of workshops, in the preceding, "Hazard Reduction," matrix. Evaluations are made when an application for an HRA is received. Sites are given a rating for risk to the soil and water resources and site visits are performed on the high-risk logging operations. During site visits, Service Foresters give technical assistance on compliance with the SMZ law and promote use of BMPs. The Department also gives technical assistance upon request and as part of the promotion of the BMP program.</p>	field/staff  field  field staff  field/staff	NA  2,000  500 0 15
<b>Comp. Planning/Withdrawals:</b> BMP Updates	<p>In FY 97, DNRC is scheduled to form working group to review current BMPs for possible revision.</p>	staff	NA
<b>Permits/Certifications:</b> Operator Notification  Revised Notification  Receipt of Notification  Termination of Requirement for Consultation	<p>Any person proposing forest practices on private land must first notify the Department. Notification must include the location of forest practices in relation to watershed features. (This can be fulfilled via application for Hazard Reduction Agreement (HRA) -- see preceding matrix, or by submission of an operating plan.</p> <p>Required if proposed changes in forest practices substantially alters the potential watershed disturbance.</p> <p>Must be sent to operator and owner within 7 days of receipt of notification. Includes information on; BMPs, conservation district requirements related to stream crossings, and other information, as well as either approval of proposal, or requirement for on-site consultation prior to harvest.</p> <p>If the department and the operator are not able to schedule an on-site consultation within the time limits, or at another mutually agreeable time, the requirement for a consultation is terminated. The operator may then proceed with forest practices immediately upon the expiration of the time limits.</p>	field  field  field	2,500  unk.  2,500  unk.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- BEST MANAGEMENT PRACTICES (BMPs)

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>BEST MGMNT PRACTICES. (cont.):</b> <b>Monitoring/Inspections:</b> Field Forester Site Visits  - Pre-Harvest Visits - Post-Harvest Visits BMP Audits	Purpose is to give guidance and to ask for voluntary compliance, coupled with informal BMP monitoring on selected high-risk sites. A site visit is requested by the Department if; the proposed sale is in a high-priority location for watershed resources, a consultation could contribute to improved watershed management, and the department has sufficient resources to conduct the consultation. In FY 95, BMP program goals were to do pre-harvest and post-harvest visits on 5% of the 122 total sites, concentrating on non-industrial private forest (NIPF) operations. Staff visit must occur within 10 days of requesting the operator for a site visit, and no less than 10 days prior to proposed initiation of operations. (see above) (see above) Conducted every 2 years (beginning in 1990) by teams of experts. Reports are issued summarizing results, and comparing results to previous audits.	field           aud. teams	122 56 NA
<b>Administrative Notices/Orders:</b> (not authorized)			
<b>Administrative Penalties/Sanctions:</b> (not authorized)			
<b>Civil Judicial Action:</b> (not authorized)			
<b>Criminal Judicial Action:</b> (not authorized)			

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- STREAM MANAGEMENT ZONE (SMZ)

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>STREAMSIDE MANAGEMENT ZONE:</b> Education/Information/T.A.: SMZ Fact Sheet Guide to SMZ Law and Rules Voluntary Wildlife Guidelines Brochure	2-sided flier providing a summary of who the SMZ law applies to, and answers to frequently asked questions. 35-page, full-color, booklet providing detailed information on how to interpret SMZ requirements (text and diagrams). 4-page brochure covering voluntary wildlife habitat management guidance for Streamside Management Zones; includes importance of snags, as well as suggestions related to choosing trees to omit from harvest, based upon wildlife values (i.e. "leave-trees"). Published in 1996.	field field field	2,000 2,000 None
<b>Comp. Planning/Withdrawals:</b> Prohibited Activities	The following practices are prohibited in a Streamside Management Zone (SMZ): clear cutting; broadcast burning; operation of wheeled or tracked vehicles (except on established roads); construction of roads (except where necessary for stream or wetland crossing); handling, storage, application, or disposal of hazardous or toxic materials in a manner that pollutes streams, lakes or wetlands, or that may cause damage or injury to humans, land, animals, or plants; side-casting or road material into a stream, wetland, or watercourse; and deposit of slash in streams or other water bodies. Exceptions are granted through approval of "Alternative Practices" (see below).	NA	NA
<b>Permits/Certifications:</b> Requests for Alternative Streamside Management Practices	Requests for alternative practices ("alternative" to management standards stated in 77-5-3051 MCA) are given technical review and site visits. The merits of the request are evaluated along with the proposed mitigation measures. Environmental Assessments are completed and reviewed. If a request is granted, it is often with conditions that help protect the integrity of the SMZ. Requests are granted if they meet the intent of the law and do not significantly diminish the functions of the Streamside Zone.	appl./field	60
<b>Monitoring/Inspections:</b> Site Inspections	Conducted in conjunction with HRA inspections, or as a result of complaints, random discovery, or other reports of violations.	field	29 730

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- STREAM MANAGEMENT ZONE (SMZ)

Tools Authorized, by Category	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>STREAM MGMNT ZONE (cont.): Administrative Notices/Orders:</b> Verbal Warnings	Issued when the forester discovers a minor technical problem with little or no damage or mitigation required, and the forester is reasonably certain that corrective and or preventative action will be taken in the future.		
Formal (written) Warning	Issued to document violations and damage and instruct mitigation/work. Generally, they are given to first-time offenders, those unaware of laws, and for minor damage or easily correctable conditions.	field	unk.
<b>Administrative Penalties/Sanctions:</b> Notice of Violation	Issued upon serious offenses, or with significant damage, to repeat violators, or when warnings have expired and repair actions have not been completed in a reasonably timely manner. Typically includes an Order to Mitigate or an Order to Cease and Repair.	staff	7
- Order to Mitigate for Damage	When the department determines that an owner or operator has violated the SMZ law and has caused damage to watershed or wildlife resources, the department may serve an order requiring the person responsible for the conduct of forest practices to undertake necessary site rehabilitation within a reasonable, stated time frame. The order must specify the nature of the violation and the damage or unsatisfactory condition resulting from the violation.	field	5
- Cease Order	The department may include in an order a provision that the owner or operator immediately cease causing further damage and take immediate action to alleviate the damage or to prevent future damage.	field	2
- Opportunity for Hearing	The order becomes final unless, within 30 days after the notice is mailed, the person named requests in writing a hearing before the department. Upon receipt of such a request, the department schedules a hearing.	appl./field	0
- Rescinding of Order	If the department finds that a violation has not occurred, or that site rehabilitation is not warranted, it rescinds the Order.	unk.	0
Civil Penalties	Penalties may be assessed for any and all violations, and are generally sought when Orders are issued. The maximum penalty amount is \$1,000 per violation, with each day of violation considered a separate violation.	Admin.	5
<b>Civil Judicial Action:</b>	The department may instigate an action for injunctive relief, if orders are not complied with. The decision to do so occurs if administrative remedies have been exhausted.	Admin.	None
<b>Criminal Judicial Action:</b> (not authorized)			



**8. History of Compliance.** Trends in compliance with Service Forestry Program rules and requirements are described and illustrated below.

Compliance with **Hazard Reduction** requirements has shown improvement over the last 15 years, as the number of state takeovers of hazard reduction activities has stayed relatively constant or declined, while the number of active HRAs more than doubled in the same time period. Relevant data for **calendar years** are shown below.

	<u>CY 1985</u>	<u>CY 1990</u>	<u>CY 1995</u>	<u>10-yr. Avg.</u>
Million Board Feet				
Harvested (private lands)	561.3	611.9	693.2	634.8
Active HRAs	1,790	2,681	4,555	2,779
State takeovers	69	66	54	68

source: Artley, 1996.

Compliance with **Best Management Practices** requirements has improved over the last five years, as shown below.

	<u>1990</u>	<u>1992</u>	<u>1994</u>
Number of sites evaluated	44	46	46
Application of practices that meet or exceed BMP requirements	78%	87%	91%
Application of high-risk practices that meet or exceed BMP requirements	53%	72%	79%
Number of sites with at least one major departure in BMP application	61%	43%	37%
Average number of departures in BMP application per site	9	5.6	3.9
Number (proportion) of practices providing adequate protection	80%	90%	93%
Number (proportion) of high-risk practices providing adequate protection	58%	77%	83%
Number (proportion) of sites having at least one major/temporary or minor/prolonged impact	64%	37%	28%
Average number of impacts per site	8	4.6	3

source: Montana Division of State Lands, 1995.

The **Streamside Management Zone** law was passed in 1991, and rules were approved in 1993, thus there is not much historical information related to compliance with this law.

**9. "Violations."** Although the Service Forestry Program may be notified of possible violations by various methods such as citizen complaints, other agency reports, or self reports, it is the responsibility of the state to determine when violations occur. Therefore, violations are identified through on-site inspections by program staff and/or documented evidence, such as mill audits.

As noted in the "tools" matrix, forestry-related operations may out of compliance, correct the problem, and not be issued a violation nor penalized. The Service Forestry Program defines a "violation" upon issuance of a formal warning, or a Notice of Violation and Order. There is no specific definition of a significant violation.

During the 1995 calendar year, the Service Forestry Program issued 60 Hazard Reduction violations and 52 warnings or orders which amounted to 167 SMZ violations. Of the violations issued in 1995, there were 12 repeat violators. All violations (warnings and orders) are issued through the Field Offices.

**Hazard Reduction** violations result in state takeover of hazard reduction activities. This may involve the use of State personnel and equipment to complete hazard reduction on the noncompliant sites, or the State may choose to contract out such work.

As shown in the following list, the most common violations related to **Streamside Management Zones** are operating equipment in the SMZ and failing to adequately mark the width of the Zone. Most violations were issued to non-industrial timberland owners. Abbreviations under the "Description of Violation" column refer to the following:

<b>Width</b>	Failure to clearly mark the Streamside Management Zone (SMZ)
<b>Burn</b>	Broadcast Burning
<b>Equip.</b>	Operating wheeled or tracked vehicles (except on established roads)
<b>Clear-cut</b>	Clear cutting in the SMZ
<b>Road</b>	Road construction (except where necessary for crossings)
<b>Hazard</b>	Handling, storage, application, or disposal of hazardous or toxic materials in a manner that pollutes streams, lakes, or wetlands, or that may cause damage or injury to humans, land, animals, or plants
<b>Side-cast</b>	Side-casting of road material (e.g. ditch cleaning debris, etc.) into streams or other water bodies
<b>Slash</b>	Depositing slash in streams or other water bodies.

**1995 Streamside Management Zone Violations, by Type and Status**

<b>Month NON Issued</b>	<b>Type of Operator</b>	<b>Desc. of Violation</b>	<b>Penalty Assessed</b>	<b>Status at Year End</b>	<b>Significant Violation?</b>
<b><u>Pending in FY 95:</u></b> <sup>1</sup>					
Aug. '94	Nonindustrial	width, equip., clrcut., road, slash	court action	pending	Yes
March '95	Nonindustrial	width, equipment, clear-cut	court action	pending	Yes
March '95	Nonindustrial	width, equip., clear-cut, slash	court action	pending	Yes
May '95	Nonindustrial	equipment, slash	court action	pending	Yes
May '95	Nonindustrial	equipment, clear-cut, slash	court action	pending	Yes
June '95	Nonindustrial	width, equipment, clear-cut	court action	pending	Yes
<b><u>Issued in FY 95:</u></b>					
July '94	Nonindustrial	width, equipment	No	resolved	No
July '94	Nonindustrial	slash	No	resolved	No
July '94	Nonindustrial	width, equipment	No	resolved	No
July '94	Nonindustrial	equip, side-cast, slash	No	resolved	No
Aug. '94	Nonindustrial	equipment	No	resolved	No
Aug. '94	Nonindustrial	width, equip, clear, road, slash	Court	pending	Yes
Aug. '94	Nonindustrial	equipment	No	resolved	No
Sept. '94	Nonindustrial	equip, hazard, side-cast	No	resolved	No
Sept. '94	Agency	width, burning	No	resolved	No
Sept. '94	Agency	equipment, slash	No	resolved	No
Dec. '94	Nonindustrial	road, slash	No	resolved	No
Dec. '94	Agency	width, equip.	No	resolved	No
Dec. '94	Nonindustrial	equipment	No	resolved	No

Dec. '94	Industrial	clear-cut	No	resolved	No
Jan. '95	Nonindustrial	width, slash	No	resolved	No
Jan. '95	Industrial	width, clear-cut	No	resolved	No
Jan. '95	Nonindustrial	width, equipment, slash	No	resolved	No
Jan. '95	Nonindustrial	road	No	resolved	No
Jan. '95	Nonindustrial	slash	No	resolved	No
Jan. '95	Nonindustrial	road	No	resolved	No
Feb. '95	Nonindustrial	equipment	No	resolved	No
Feb. '95	Nonindustrial	equip., clear-cut, road, slash	No	resolved	No
March '95	Nonindustrial	width, equip., clear-cut, slash	court	pending	Yes
March '95	Nonindustrial	width, equipment, clear-cut	court	pending	Yes
March '95	Nonindustrial	width, equipment, clear-cut	No	resolved	No
March '95	Nonindustrial	width, equip., clear-cut	No	resolved	No
March '95	Nonindustrial	equipment, slash	No	resolved	No
April '95	Nonindustrial	equipment, slash	No	resolved	No
April '95	Nonindustrial	width, equipment	No	resolved	No
April '95	Nonindustrial	width, equip., slash	No	resolved	No
April '95	Nonindustrial	equipment, slash	No	resolved	No
April '95	Nonindustrial	equipment	No	resolved	No
April '95	Nonindustrial	clear-cut, slash	No	resolved	No
May '95	Nonindustrial	equip., clear-cut, slash	No	resolved	No
May '95	Nonindustrial	equipment, slash	court	pending	Yes
May '95	Nonindustrial	width, equipment	No	resolved	No
May '95	Agency	width, equipment	No	resolved	No
May '95	Nonindustrial	equip., clear-cut, slash	court	pending	Yes
May '95	Industrial	road	No	resolved	No
May '95	Nonindustrial	width, equip., clear-cut, slash	\$17,450	resolved	Yes
May '95	Industrial	clear-cut	No	resolved	No
June '95	Nonindustrial	width, clear-cut, slash	No	resolved	No
June '95	Nonindustrial	width, equip., clear-cut, road	No	resolved	No
June '95	Nonindustrial	width, equipment, clear-cut	court	pending	Yes
June '95	Nonindustrial	equip., roads, side-cast, slash	No	resolved	No
June '95	Nonindustrial	width, equipment	No	resolved	No
June '95	Non-Industrial	width, equipment	No	resolved	No
June '95	Non-Industrial	width, equipment	No	resolved	No
June '95	Agency	equipment	No	resolved	No
June '95	Non-Industrial	width, equipment, slash	No	resolved	No
June '95	Non-Industrial	width, equipment, clear-cut	No	resolved	No
June '95	Non-Industrial	equipment, slash	No	resolved	No

Notes:

<sup>1</sup> The six pending actions in FY 95 involved three non-industrial operators whose cases will be resolved through District Court actions.

source: Artley, 1995, 1996; Lennon, 1996.

**Discovery of Violations.** Over the long term, most violations in the Service Forestry Program are discovered through inspection or citizen complaint, as shown below.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	<u>Citizen Complaint</u>
Hazard Red.	60	None	0	60	None
Best Mgt. Pract.	NA	NA	NA	NA	NA
Stream Mgt. Zone	<u>52</u>	<u>11</u>	<u>2</u>	<u>36</u>	<u>3</u>
<b>TOTAL</b>	<b>112</b>	<b>11</b>	<b>2</b>	<b>96</b>	<b>3</b>

source: Artley, 1996.

**10. Considerations in Calculating Penalties.** The department's Standards and Guidelines for the HRA and SMZ programs provide guidance in calculating penalties; these are summarized on the next page. The BMP program is voluntary, thus no penalties are authorized.

**Hazard Reduction Act (HRA):** The contractor is to do the necessary hazard reduction work within 18 months following the start of the cutting operation. If they fail to do so, the State may take over the hazard reduction responsibilities, and do the work at cost, plus 20%, as a penalty. The State may also assign the responsibility to another party, or elect to provide additional forest fire protection in the area until the hazard has been naturally reduced to an acceptable level.

If a purchaser (mill) does not submit withheld money and reports, the state may initiate a lien upon the real property of the purchaser and initiate proceedings to enjoin further processing of all wood products until all money is paid and reports are submitted. A penalty of 5% must be assessed. The State may impose interest of 10%/year on any balance remaining unpaid. The purchaser may be required to post a bond to the State to ensure faithful compliance.

**Streamside Management Zone (SMZ):** Penalties are assessed using a mathematical formula that considers the base amount, cooperation, prior knowledge, damage to resources, and extent to which damage can be repaired and avoid future damage, described as follows:

$$\text{Penalty} = \text{Base \$} (\text{Coop} \times \text{Prior}) + [(\text{Base \$} \times \text{Damage}) - (\text{Base \$} \times \text{Damage} \times \text{Repairability})]$$

<b>Base</b>	A value of \$25 or \$50 is assigned, depending upon the type of violation
<b>Coop</b>	A value of 1 or 2 is assigned whether the person is making all feasible steps necessary to correct the violation for which the penalty is being assessed.
<b>Prior</b>	A value of 0.5 to 5.0 is assigned whether the person had prior knowledge or prior violations, after reviewing DNRC records of violations and operation notifications.
<b>Damage</b>	A value of 0 to 10 is assigned as a measure of the extent or relative adverse effect of the violation.
<b>Repairability</b>	A decimal value between 0 and 1 is assigned as a measure of how difficult it will be to repair the damage resulting from the violation, compared to the total damage if the violation was left uncorrected.

**11. Resolution of Noncompliances.** With the bonding system to ensure compliance, very close to 100% of the noncompliance cases get resolved. If a mill fails to report and send required bond money, the operation will be shut down by court order until requirements are met. There has been only a few

cases that the state hasn't collected amounts due, because the mill permanently ceased to operate and had no assets to collect the amount due.

The SMZ program has been operating for three years and many of the operations with forest practices that are covered under the law are just beginning to be inspected. Most of the landowners or operators that are responsible for the identified violations have been willing to perform the requested mitigation or to repair any damage. We have only a half dozen operations that have not been resolved and are currently proceeding with legal action and civil penalties to resolve the noncompliance.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Service Forestry Program:

- Seek voluntary compliance and site rehabilitation through warning, conference, or other appropriate means.
- Most resource protection can be obtained through information, education and assistance.
- All fire hazard caused by logging residues, road construction, or other cutting on private forest lands are abated to a level that meets DNRC standards.
- When the natural resource has been threatened and the information/education does not bring the desired result, aggressive follow-up of enforcement actions should be taken.

Short-term priorities (i.e. next 12 months, or so) for the Service Forestry Program include:

- Initiate BMP development and revision.
- Participate in Forest Practices and slash orientation workshops for landowners, and other education projects, in cooperation with other agencies and organizations.
- Complete 1996 BMP Audits and reports.
- Develop information brochure on alternative fuel reduction treatments.

### **13. Compliance Relationships with Other Agencies.**

**Oversight.** None.

**Partnerships.** Although the BMP law is considered voluntary, both State and Federal agencies have agreed to practice and monitor BMPs on their respective lands. The program maintains an MOU with the Forest Service and the Bureau of Land Management with respect to the SMZ law, and it appears to be working. At the time of this writing, there is no agreement between state agencies, primarily due to recent reorganization. However, when a SMZ violation occurs on state lands, the Service Forestry Program is notified, and the local field forester responsible for SMZ compliance inspects the site and recommends appropriate actions.

Program informational brochures also include references to requirements of the Natural Streambed and Land Preservation Act (310 Permit Program), and the Montana Water Quality Act, which are implemented by other agencies.

**Delegated Authority.** None.

# Fire and Aviation Program

Functionally, the Fire and Aviation Program protects the natural resources of the state from destruction by fire. There are over 50 million acres of state and private owned lands which are protected through plans or as required by law. Over 5 million are protected by the DNRC Fire and Aviation Program, almost 2 million acres are subcontracted to federal agencies for fire protection services and over 45 million acres are protected under the state/county cooperative fire protection network. There are approximately 245,000 acres of unprotected forest land in Montana at this time.

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Fire and Aviation Program.

Primary constitutional and statutory authorities (see Appendix B):

- 76-13-101, MCA. The purpose of the statutes is to provide for the protection and conservation of forest resources.
- 77-5-103, MCA. The department shall take such action as is authorized to prevent and extinguish forest, brush, and grass fires and enforce the laws pertaining to those fires.

Supplemental and/or related state authorities:

- Uniform Fire Code adopted pursuant to 50-3-102, 50-3-103, and 50-61-120, MCA.

Related federal authorities:

- Granger-Thye Act of 1950 Section 5; 16 U.S.C. 572
- Reciprocal Fire Protection Act of 1955; 42 U.S.C. 1856a
- Secretary of Agriculture Fire Authorization Act of 1975; P.L.94-148; 16 U.S.C. 565a 1-3
- Rural Development Act of 1972; P.L. 92-419
- Robert T. Stafford Disaster Relief & Fire Emergency Assistance Act; P.L. 93-288
- Cooperative Forestry Assistance Act of 1978; P.L. 95-313

- P.L. 101-624 U.S.C.
- Federal Aviation Regulations

Specific enforcement authority:

- 76-13-104, MCA. Functions of the department include giving technical advice concerning forest fire protection.
- 76-13-121, MCA. Burning permits required.
- 76-13-122 through 125, MCA. Specific violations are misdemeanors.
- 76-13-201 et seq, MCA. Provision of fire protection services.
- 76-13-408, MCA. Fire hazard reduction agreement and bond required.
- 76-5-104 through 106, MCA. Firewarden authority.
- Sections 26.6.209 through 26.6.215 and Sections 26.6.218 through 26.6.222, ARM

Primacy and jurisdictional agreements:

- Master agreements with the following entities:
  - U.S. Forest Service
  - U.S. Bureau of Land Management
  - National Park Service
  - U.S. Bureau of Indian Affairs
  - Various Tribal Governments

**2. Program Goals.** Based on the above-referenced guidance, the Fire and Aviation Program has identified the following program goals:

1. Ensure firefighter's safety.
2. Hold 95% of all fires to 10 acres or less in size.
3. Reduce the number of person-caused fires.

**3. Program Activities.** The Fire and Aviation Program is broken down into 6 distinct activities.

- **Equipment Development and Support** - This section acquires, develops, warehouses, maintains, inventories and inspects fire equipment and supplies.
- **Fire Prevention** - The purpose of this section is to reduce the number and severity of wildfires

occurring each year. The prevention program is made up of three parts: engineering through prescribed fire and fuel management, education, and enforcement measures.

- **Fire Training** - The DNRC wildland fire training program is a performance-driven program designed and mandated to "provide training to state firefighters and other cooperators requiring training".
- **Aviation** - The Aviation section provides mission-capable aircraft and aircraft support for all DNRC functions.
- **Pre-suppression/Suppression/Fire Coordination** - This section includes all activities required in preparation to detect and suppress forest and range fires in Montana on state and private ownerships.
- **Fire Administration** - The section is responsible for overall management of the DNRC fire management program. The goal of the program is to protect the natural resources of the state from destruction by fire.

Additional information on these activities is provided below.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr</u>
Equipment Devlpmt and Support	\$568,174	9.5	Unknown	N/A	N/A	N/A
Fire Prevention	\$139,807	3.0	Unknown	N/A	N/A	N/A
Fire Training	\$135,215	2.28	Unknown	N/A	N/A	N/A
Aviation	\$426,254	5.8	Unknown	N/A	N/A	N/A
Pre-Supp/Supp and Coordination	\$3,979,586	103.67	Unknown	N/A	N/A	N/A
Fire Administration	\$173,371	2.0	Unknown	N/A	N/A	N/A

source: Program Plan, 1996.

**Fees and Charges.** The Fire and Aviation Program receives the following fees from the regulated community. Additionally, they are authorized and do collect fees to reimburse fire suppression services where authorized.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees:	Not authorized	\$0	
Permit Renewal Fees:	Not authorized	\$0	
MEPA Fees:	Not authorized	\$0	
Noncompliance Penalties:	Not authorized	\$0	
Fire Protection Fees:	Varies <sup>1</sup>	\$1.6 million	Funds basic program
Cost Reimbursement for fire suppression:	Varies	\$85,000	General fund
<b>PROGRAM TOTAL:</b>		<b>\$1.6 million</b>	

1. \$20 for the first 20 acres and \$0.17 for each additional acre of forest land. See 76-13-201, MCA for details on forest land covered by these fees.

**4. Regulated Communities.** The laws regarding forest fires of the state apply to all citizens or other legal entities within the state. Burn permits also help identify specific members of the regulated community.

**5. Philosophical Approach to Compliance.** Prevention is the best enforcement tool. An aggressive education and information program can influence people's behavior and thereby reduce violations.

**6. Compliance Tools Available and Used.** The menu of tools used by the Fire and Aviation Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest incentive for compliance with DNRC's rules and regulations is a citizen's sense of moral and civic responsibility. Their program has identified and officially recognized individuals and organizations that have provided exceptional assistance and cooperation during extreme fire seasons.

**8. History of Compliance.** Program staff indicate that this is difficult to determine because the program lacks adequate resources to track the number of violations reported.

**9. "Violations."** As noted above, this information is not available.

**Discovery of Violations.** Violations of the forest fire rules and regulations are identified as the result of on-site inspections or responses to calls from concerned citizens. Detection of violations by program fire patrol units is also a common occurrence.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			<u>Citizen Complaint</u>
		<u>Agency Review of Monitoring Reports</u>	<u>Self-Reporting of Violation</u>	<u>Inspection</u>	

Specific information not available.

**10. Considerations in Calculating Penalties.** The Fire and Aviation Program has no formal penalty calculation for violations. There are categories of violations based on whether a specific violation is administrative or criminal, and based on the seriousness of the violation.

**11. Resolution of Noncompliances.** While no formal records are kept regarding violations or their resolution, the program attempts to bring violators into compliance through informal contacts and only occasionally will the program staff resort to notification of local law enforcement agencies.



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- FIRE AND AVIATION PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95) <sup>1</sup>
Education/Information/T.A.	Presenting or providing fire protection information, education, and technical assistance is a normal, routine duty of program field foresters.	All field offices	Routine
Planning or Withdrawals: Restrict activities, e.g., campfires, smoking, etc., in areas of high fire hazard. Closure of state forests.	Area restrictions or closures depend on the severity of the fire hazard.	Division Administrator Governor	0 0
Permits/Certifications/Bonds Burning permits	Burning permits are required during the forest fire season of May 1 through September 30 plus extensions if any.	All field offices	10,000 Approx
Monitoring/Inspections:	Field foresters routinely monitor and inspect the forests throughout their normal activities. Attention is increased as the fire danger increases.	All field offices	Routine
Administrative Notices/Orders:	Administrative action will be taken if an individual refuses to voluntarily comply with program regulations and statutes.  Program staff actions may include notification of local law enforcement agencies.	Division Administrator  All field offices	0

## Notes:

<sup>1</sup> There were fewer fires during the 1995 fire season than any other season on record. 1995 data may therefore be misleading. For example, the very active 1994 fire season saw many forest restrictions imposed throughout the state.

STATE COMPLIANCE/ENFORCEMENT TOOLS -- FIRE AND AVIATION BUREAU				
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95) <sup>1</sup>	
Admin. Penalties/Sanctions: Not authorized <sup>2</sup>			0	
Civil Judicial Action:	An individual who negligently causes a forest fire can be required to reimburse the program for fire suppression costs.	Department Director	0	
Criminal Judicial Action: Not authorized			0	

Notes:

<sup>2</sup> The program is not authorized to impose or collect any penalties. They must rely on local law enforcement agencies.

**12. Current Compliance Priorities.** The DNRC Fire and Aviation Management Program has identified priorities which revolve around protection of life and property, and the natural resources of Montana, with special emphasis in Wildland Urban Interface areas. This protection responsibility includes approximately 5.12 million acres of direct protection as well as 45 million acres of protection responsibility through the State/County Cooperative Fire Protection program.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** There is no oversight of this program by other agencies.

**Partnerships.** The Fire and Aviation Program has interagency agreements with various fire service entities and federal government agencies. These agreements are working well. For example during particularly dangerous fire seasons the program works closely with all cooperating agencies to implement the restrictions and closure process as it applies to lands under the program's jurisdiction.

**Delegated Authority.** 76-13-102 and 76-13-202, MCA authorize the State Land Board to recognize fire protection agencies for the purposes of providing forest fire protection in Montana. In addition to the DNRC, officially recognized agencies with fire protection authority include the U.S. Forest Service, the Bureau of Land Management, the Bureau of Indian Affairs, and the Flathead Agency, Confederated Salish and Kootenia Tribe. Additionally,, the DNRC annually delegates authority by statute to approximately 400 fire wardens from the DNRC and cooperating agencies that assist the DNRC with enforcement of Montana's Forest Fire Rules and Regulations.

## OIL AND GAS CONSERVATION DIVISION

The Oil and Gas Conservation Division administers the Montana oil and gas conservation laws to promote conservation and prevent waste in the recovery of these resources through regulation of exploration and production of oil and gas. To meet this goal, the division: 1) issues drilling permits; 2) classifies wells; 3) establishes well spacing units and pooling orders; 4) inspects drilling; production, and seismic operations; 5) investigates complaints; 6) does engineering studies; and 7) collects and maintains complete well data and production information.

The oil and gas state special revenue account funds this program. Revenue is derived from fees paid for drilling permits, a tax on oil and gas production, interest earnings, and miscellaneous fees for photocopy and other services.

6706 22 00000 DEPT NAT RESOURCE/CONSERVATION Program Summary		OIL & GAS CONSERVATION DIVISION						
Budget Item	Base Budget Fiscal 1994	PL Base Adjustment Fiscal 1996	New Proposals Fiscal 1996	Total Leg. Budget Fiscal 1996	PL Base Adjustment Fiscal 1997	New Proposals Fiscal 1997	Total Leg. Budget Fiscal 1997	Total Leg. Budget Fiscal 96-97
FTE	24.50	0.00	(6.50)	18.00	0.00	(6.50)	18.00	18.00
Personal Services	609,756	211,458	(196,294)	624,920	214,772	(197,144)	627,384	1,252,304
Operating Expenses	182,727	226,287	0	409,014	224,825	0	407,552	816,566
Equipment	2,628	20,693	0	23,321	22,439	0	25,067	48,388
Debt Service	857	(203)	0	654	(203)	0	654	1,308
Total Costs	\$795,968	\$458,235	(\$196,294)	\$1,057,909	\$461,833	(\$197,144)	\$1,060,657	\$2,118,566
<b>Fund Sources</b>								
State/Other Special	795,968	458,235	(196,294)	1,057,909	461,833	(197,144)	1,060,657	2,118,566
Total Funds	\$795,968	\$458,235	(\$196,294)	\$1,057,909	\$461,833	(\$197,144)	\$1,060,657	\$2,118,566

source: LFA 1995

## Legislative History

Significant legislation and administrative rule changes for the Oil and Gas Conservation Division are summarized below.

Year	Legislation
1953	Oil and Gas Conservation Act passed- established Oil and Gas Commission.
1971	Oil and Gas Commission changed to Board of Oil and Gas Conservation and allocated to DNRC for administrative purposes.
1979	Board given Natural Gas Policy Act responsibilities.
1985	Governor's office authorized to prepare Programmatic Environmental Impact Statement in conjunction with the Board to incorporate MEPA compliant procedures into permitting process. PEIS adopted by Board in 1989.
1987	Board authorized to negotiate a primacy delegation from U.S. EPA to the Board for Underground Injection Control Program (UIC). Board given exclusive jurisdiction over Class II injection wells. Civil and criminal penalties established for violations of Board rules and orders.
1989	Legislature establishes Oil and Gas Production Damage Mitigation Account and provides statutory appropriation to allow expenditures for proper plugging and restoration of well sites.
1990	Drilling permit procedures changed to provide public notice of proposed wells located in

- previously undeveloped areas, provision for hearing to resolve protests.
- 1992 Administrative rules adopted to implement PEIS recommendations. Administrative rules to implement UIC program adopted.
- 1993 Individual and Statewide well bonds increased from \$5,000/\$10,000 to \$10,000/\$25,000, respectively; shallow single well bond established at \$5,000.
- 1993 Board given responsibility for production increment determination to implement Horizontal and Enhanced Recovery Tax Incentive Act. Administrative rules adopted in 1994.
- 1996 Amended UIC rules adopted, effective May 10, 1996.

# Oil and Gas Conservation Program

The Board of Oil and Gas Conservation is charged with administering Montana's oil and gas laws. The purpose of the board is to prevent waste and promote conservation in the recovery of oil and gas through the regulation of exploration and production.

**1. Statutory Goals.** The following provides a guide to the statutory, federal, and rule authority for the activities of the Board of Oil and Gas Conservation (BOGC or board).

Primary statutory authorities (see Appendix B):

- **Montana Oil and Gas Conservation Act (1953)** (MCA 82-11-, et. seq.) provides for the
- **Underground Gas Storage Reservoirs** (82-10-300, et. seq.)
- **Abandoned Oil and Gas Wells-Reclamation** (82-1-100 et. seq.)

Supplemental and/or related state authorities:

- **The Montana Environmental Policy Act** (MCA 75-1-101, et seq.)
- **Clean Water Act of Montana** (MCA 75-5-101, et. seq.)

Related federal authorities

- **Underground Injection Control** -( 42 U.S.C.300f

*et. seq.* Currently EPA administered)

*Pending delegation to BOGC under section 1425 of Safe Drinking Water Act*

Oil and Gas administrative rules:

- ARM 36.22.101 et.seq

Specific enforcement authority:

- MCA 82-11-111, 82-11-123 & 124, 82-11-147 through 149.
- ARM 36.22.1200 et. seq. and 36.22.1300 et. seq.

Primacy/jurisdictional agreements:

- Bureau of Land Management -spacing of wells and pooling of interests.
- U.S. EPA -Administration of UIC program

**2. Program Goals.** Based on the above-referenced guidance, the Oil and Gas Conservation Program goals include the following:

1. **Conservation of the oil and gas resource** - maximization of the ultimate recovery from a given oil or gas reservoir by encouraging proper well spacing, institution of timely enhanced recovery projects and use of good oil field production.
2. **Prevention of waste** -includes both the minimization of physical waste and the prevention of economic waste, such as drilling too many wells to recover the existing resource.
3. **Protection of correlative oil and gas rights**--each owner of oil and gas must be given the opportunity to recover its fair share of the resource.
4. **Prevent contamination of or damage to surrounding land or underground strata.**

**3. Program Activities.** One third of the board's staff is dedicated to direct enforcement and compliance activities. The board maintains 5 full time field inspectors and a supervisory inspector. Inspectors are assigned to geographic areas. The other administrative staff members spend an estimated 15 -30% of available time on compliance issues. Much of this staff time is spent monitoring and assuring receipt of production and well status reports, completion reports and well logs submitted in compliance with the board's rules. The professional staff generally spend a similar amount of time reviewing permit requests and other proposals to perform well work for compliance with spacing orders and other board rules. Program resources and demands are described in more detail on the following page.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr**</u>
Inspections:						
Producing wells				4,114	N.A.	152
Drilling Inspection				268	N.A.	256
Plugging inspections				<u>243</u>	N.A.	<u>235</u>
Total inspections		<u>6.0</u>	<u>9.9</u>	4,625	N.A.	643
Permits		2.0	9.7		267	267
<b>TOTAL</b>	<b>\$1,057,909</b>	<b>16.0*</b>	<b>11.85 years</b>	<b>4892</b>	<b>N.A.</b>	<b>910</b>

\*Total division current staff

\*\* estimates based on 1994 Annual Review and 1995 Quarterly Bulletins

source: 1994 Annual Review and 1995 Quarterly Bulletins, Richmond, 1996.

**Fees and Charges.** Program revenues are derived from a license tax, a 0.03% tax on oil and gas production. Other sources of income include drilling permit fees.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Drilling permit fees:			
0 to 3500 feet --	\$25	-	-
3501 to 7500 --	\$75	-	-
below 7500 --	\$150	-	-
Total permit fees		\$12,000	operating expenses
License Tax*	0.03% of production value	\$717,000	operating expense
Other		24,500	operating expense
Noncompliance Penalties:	varied	<u>\$5,000</u>	general fund
<b>TOTAL:</b>		<b>\$753,500**</b>	

\*Privilege and License tax revenue depends on oil and gas price and is highly variable.

\*\* Does not include penalties which are general fund revenue, not program revenue.

source: Richmond, 1996.

**4. Regulated Communities.** The owners, operators, or producers of oil and gas wells and the mineral Owners are the "regulated communities". The number of regulated entities in FY 95 was approximately 240 oil producers and 177 gas producers. Some oil producers may also operate natural gas wells and vice versa. The number of mineral owners is not directly known; the federal and state governments are the largest mineral owners, followed by some large owners such as the successors in interest to the land grant railroads. In contrast, some small tracts may have scores of people owning extremely small fractional interests.

**5. Philosophical Approach to Compliance.** Both the board and staff make efforts to promote cooperative approaches to compliance. Compliance assistance takes first priority but occasional enforcement actions are necessary.

**6. Compliance Tools Available and Used.** The board adopted an enforcement policy for its staff at its February 3, 1994 meeting. The menu of tools used by the BOGC is illustrated beginning on the next page.



**STATE COMPLIANCE/ENFORCEMENT TOOLS -- BOARD OF OIL AND GAS CONSERVATION**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/T.A.:</b> Presentations at informal gatherings, board hearings, professional societies.	Upon request and when scheduled for board meetings (Includes both staff and third party presentations at Board meetings)	Prof. Staff	8
Informal Discussions w/ operators	Field inspections, board meetings, phone contact.	Prof Staff	daily
On-Site Technical Assistance	Field inspections (Note: only a small number of field inspections are performed with operating personnel present --times used base on 5% of inspections)	Field Insp	200
<b>Comprehensive Planning/Withdrawals</b>	Not Authorized	Not Applicable	Not Applicable
<b>Permits/Reports/Bonds:</b> Application for permit to drill.	Notice of intention to drill must include information identifying the area where the proposed activity will occur.	N.A.	267
Well drilling reports	Within 30 days after the completion of a well drilled for oil or gas a completion report must be filed with the board.	N.A.	210
Well Logs	Owner or operator must keep petrophysical log sufficient to determine formation tops from total depth to the base of the surface casing unless waived by administrator.	N.A.	N.A.
MEPA Review	MEPA review is conducted for all proposed wells	staff	267
Bonding	The owner or operator of a single well or multiple wells must provide a penal bond for the performance of the duty to properly plug each dry or abandoned well and to restore the surface of the location as required by board rules. ( number reported is the number of <u>new</u> bonds approved during 1995)	staff	39

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- BOARD OF OIL AND GAS CONSERVATION

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Monitoring/Inspections:</b> Informal Self Monitoring Site Inspections	Ad hoc Well completion reports/well logs are required (number reported is based on receipt of Form #4 -completion report) Field staff conduct ongoing inspections using unannounced routine inspections. Inspectors place high priority on the witnessing of plugging operations, setting of surface casing to protect fresh water, and similar events during drilling and production operations. Goal is one inspection per well per year; however, gas wells are usually low priority and are not usually inspected annually.	N.A. N.A. Field Insp.	N.A. 210 4500
Complaint Generated Inspections Violation Avoidance	Upon receipt of complaint. If staff notice specific problems that can be immediately corrected (Note: inspectors will give oral warnings if an operator's representative is present and problem can be resolved quickly)	Field Insp staff	25 250
<b>Administrative Notices/Orders/Penalties:</b> Oral or informal written notices of violation Written Warnings Formal Written Violations Administrative Penalties	Orally confirmed to operator during inspection or sent to operator after inspection, if problems are discovered; includes steps necessary to correct them, and a time frame to do so. <i>Written notice issued by field inspector, mailed to operator by supervisor</i> <i>Notice issued by supervisor, send certified mail.</i> Violation or threatening to violate the statute, rules, or order of the board the Board authorized to assess administrative penalties up to a maximum of \$125,000	Field Insp Field Insp Supervisor Administrator	450 196 15 0

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- BOARD OF OIL AND GAS CONSERVATION

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Admin. Penalties/Sanctions:</b>  Pipeline Severance  Shutdown Order  Bond Forfeiture	<p>An order to the oil and gas purchaser that production from a certain property(ies) may not be purchased <i>(May be delegated to staff under some circumstances)</i></p> <p><i>An order to immediately cease all production/drilling activities</i></p> <p>Failure to properly plug and abandon wells ( <i>Failure to properly plug includes not permanently plugging the wellbore and/or not reclaiming the disturbed area to its original grade and productive capacity</i>)</p>	Board  Board  Board	1  1  1
<b>Civil Judicial Action:</b>  Civil Penalties  Civil Court/Injunction/Restraining Order	<p>Board has the authority to pursue civil penalties of at least \$75 and not more than \$10,000 a day for each violation it that person violates any rule or order of the Board. Each day of violation constitutes a separate violation.</p> <p>Board can pursue if violation or threatened violation facts warrant. <i>Board may also pursue recovery of costs if it must use state funds to perform</i></p>	Board  Board	1  1
<b>Criminal Judicial Action:</b>  Criminal Penalties	<p>A person who willingly violates any lawful rule or order of the board or if that person, for the purpose of evading any law, rule or order of the board, knowingly and willfully makes or causes to be made a false entry or statement in a report or omits or caused to be omitted from the record, account, or memorandum full, true, and correct entries, etc. Board and County Attorney discretion.</p>	Board or County Attorney	1

source: Richmond, 1996.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with BOGC rules and regulations are the cooperative efforts of the board, staff, and regulated community in combination with field inspections. BOGC works closely with the regulated community to ensure proper drilling, plugging, and well operation.

**Agency-Generated.** BOGC conducts an ongoing inspection program using unannounced routine inspections. Board requires copies of third party service invoices or reports for independent verification of certain important procedures. Informal discussion and contact with the regulated community provide a forum of interactive compliance.

The state is a member of the Interstate Oil and Gas Compact Commission. The IOGCC provides a forum for interaction between state regulators, federal program managers and the regulated community. Board and staff attend and participate in IOGCC activities. IOGCC provides recommended rules and statutes for state consideration, training for regulatory personnel, and peer review of state programs.

**Industry-Generated.** The Montana Petroleum Association and the Northern Montana Oil and Gas Association provide education opportunities for its members through a guest speakers, informal agency seminars, and direct mailing of regulatory information and discussion of compliance issues to membership. Mineral owner groups perform a very similar service to their members. The two active mineral owners association are the Montana Land and Mineral Owners Association and the Northeast Montana Land and Mineral Owners Association. The American Petroleum Institute (API) establishes criteria for a industry standard practices which include regulatory and compliance guidance for industry. Independent Producers Association of Mountain States (IPAMS) and the Independent Petroleum Association of America (IPAA) have Montana representatives and disseminate information on current regulatory issues to their membership. Several Board members are actively involved in one (or more) of these organizations.

**Other.** The Society of Petroleum Engineers, the Montana Geological Society, Montana Association of Professional Landmen and similar professional groups provide a forum for discussion and review of the technical aspects of regulatory and compliance issues. Both board members and the board's professional staff are active members of such groups.

**8. History of Compliance.** The BOGC generally issues 200 violations annually. In 1995 the board forfeited 2 bonds.

Trends in compliance with BOGC rules and requirements are illustrated below.

Inspection Items		Signif. Noncompl. <sup>1</sup>	Other Noncompl. <sup>2</sup>
1995	4892	10	196
1990	5343	6	224
1985	6641	None	70 <sup>3</sup>

<sup>1</sup> Significant noncompliance is defined as a non compliance that resulted in an administrative hearing before the Board of Oil and Gas Conservation.

<sup>2</sup> Other noncompliance is defined as written notifications of noncompliance.

<sup>3</sup> Only one field inspector's records are available for 1985; at the time 3 inspectors were employed.

source: Richmond, 1996.

**9. "Violations."** During the 1995 calendar year, BOGC issued: 13 formal written notices of violations and 196 written warnings.

The FY 95 list of BOGC violations (both issued and pending) is shown below.

<u>1995 BOGC Violations, by Type and Status</u>					
<u>Month NOV</u> <u>Issued</u>	<u>Type of</u> <u>Operator</u>	<u>Desc. of</u> <u>Violation</u>	<u>Penalty</u> <u>Assessed</u>	<u>Status at</u> <u>Year End</u>	<u>Significant</u> <u>Violation?</u>
1/95	Operator	Failure to file bond	no**	resolved	y*
1/95	Operator	Failure to restore location	yes	bond forfeited	y
7/95	Operator	Shut in wells, no production	no	bond limited to existing wells	y
7/95	Operator	Failure to complete well and cleanup location	no	pending	y
7/95	Operator	Failure to reclaim pit	no	resolved	y
11/95	Operator	Failure to file change of operator	no	Shut -in Order	y
11/95	Operator	Failure to plug and restore	yes	bond forfeited	y
11/95	Operator	Failure to cleanup spills	no	pending	y
11/95	Operator	Failure of restore location	no	resolved	y
11/95	Operator	Failure to file change of operator	yes	fined \$500	y

\*Note: All violations which must be brought to the Board as a show cause matter are considered significant. In some cases the underlying violation is minor, but repeated staff attempts to resolve the issue have been unsuccessful.

\*\*only a monetary fine or bond forfeiture is reported here as a penalty.

source: Richmond, 1996.

**Discovery of Violations.** Most violations are discovered through on site inspections as shown below.

<u>Violations Discovered, by method, 1995</u>					
<u>Group</u>	<u>Total</u>	<u>Agency Review of</u> <u>Monitoring Reports</u>	<u>Self-Reporting</u> <u>of Violation</u>	<u>Inspection</u>	<u>Citizen</u> <u>Complaint</u>
Owner/Operator	196	3	0	192	1

source: Richmond, 1996.

**10. Considerations in Calculating Penalties.** In the oil and gas program there is not a calculation formula.

**11. Resolution of Noncompliances.** According to program staff, on average, 95% of the violations are resolved informally with a field visit and advice with an informal notice or warning. The remaining 5% the violations are resolved administratively through administrative hearings before the board. Over its history, the board has recommended one case for criminal prosecution.

**12. Current Compliance Priorities.** Agency staff have identified the following short-term priorities for the oil and gas program: resolution of landowner complaints, witnessing drilling of surface hole and cementing surface casing, witnessing plugging of wells, and plugging orphaned wells using agency and grant moneys. Reviewing shut-in well status and implications for long time future liability; review current bonding requirements and regulatory procedures financial assurance.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** The Underground Injection Control program has oversight requirements by U.S. EPA..

**Partnerships.** BOGC has direct enforcement responsibilities that generally do not require MOU's or procedural agreements with other agencies to proceed with enforcement matters. The Board does have MOU's with the Bureau of Land Management on spacing hearing, forced pooling and similar activities that effect federal lands. An MOU with DNRC addresses primarily data and information sharing. An MOU is proposed with EPA to cover UIC program activities.

**Delegated Authority.** None

## WATER RESOURCES DIVISION

The mission of DNRC's Water Management Division is to administer and enforce Montana's water well, floodplain management, water measurement, dam safety, and water right programs in an efficient and effective manner. Budget, funding source, and staffing information for the division and its programs is provided below.

<u>Program</u>	<u>Funding Source FY 96</u>				<u>Total Funds</u>
	<u>General Fund<sup>1</sup></u>	<u>RIT</u>	<u>Federal</u>	<u>Other</u>	
<b>Board of Water</b>					
<b>Well Contractors</b>	\$52,000				
<b>Flood Plain Management</b>	52,800				
<b>Water Measurement</b>	37,300				
<b>Dam Safety</b>	205,740				
<b>Water Rights</b>	<u>2,443,433</u>	NA	NA	NA	NA
<b>Total (FY 96)</b>	\$2,609,966				

Notes:

1. The department did not differentiate between general funds and RIT funds.

## Legislative History

Events important to the compliance/enforcement elements of the Water Resources Division are summarized below.

- 1889     Original state constitution holds all apportioned water to be a public use.
- 1960's   Board of Water Well Contractors (BWWC) created.
- 1970's   New state constitution ratified protecting existing water rights.  
           Permit system for all new water uses enacted - general revision of the water use laws.  
           Water reservation process enacted.  
           Water rights adjudication process enacted.  
           Floodplain and Floodway Management Act enacted.
- 1980's   Water marketing legislation enacted.  
           BWWC moved to DNRC.  
           U.S. Army Corps of Engineers study identifies 35 unsafe high hazard dam in Montana.  
           Dam Safety Act enacted.  
           Instream flow pilot study created.
- 1990's   Water Measurement program created and two watercourses identified as chronically dewatered.  
           Instream flow legislation enacted.

# Board of Water Well Contractors (BWWC) Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the BWWC Program.

Primary constitutional and statutory authorities (see Appendix B):

- **37-43-101. Purpose** - to reduce and minimize the waste and contamination of ground water resources and to protect the health and general welfare by providing a means for the development of the natural resource of underground water in an orderly, sanitary, and reasonable manner.

Supplemental and/or related state authorities:

- 85-2-505, MCA, Montana Water Use Act - Waste and contamination of ground water prohibited.
- 85-2-514, MCA, Inspection of wells
- 85-2-516, MCA, Well logs
- 85-2-517, MCA Reports by water well drillers
- 75-11-201 et. seq. MCA, Montana Underground Storage Tank Installer Licensing and Permitting Act

Specific enforcement authority:

- 37-43-202, MCA, Powers and Duties
- 37-43-309, MCA, Complaints and Investigations
- 37-43-310, MCA, Disciplinary Procedure
- 37-43-312, MCA, Penalties
- 37-43-313, MCA, Disciplinary Authority
- 37-43-314, MCA, Injunctions
- ARM 36.21.101
- ARM 36.21.201 and 202
- ARM 36.21.401 thru 414
- ARM 36.21.501 thru 506
- ARM 36.21.601 thru 680
- ARM 36.21.701 thru 703
- ARM 36.21.801 thru 810

Primacy and jurisdictional agreements:

- None

Related federal authorities:

- None

**2. Program Goals.** Based on the above-referenced guidance, the BWWC Program has identified the following program goals:

1. Prevent the waste and contamination of Montana's ground water resource.
2. Protect the public health and general welfare through the orderly, sanitary and reasonable development and conservation of the ground water source.
3. Administer and enforce the BWWC's statutory authority for licensing and disciplinary actions.
4. Enforce BWWC administrative rules for minimum construction standards for water well and monitoring wells.
5. Respond to all complaints or inquiries in a timely manner.
6. Initially attempt to resolve conflicts between consumers and driller/contractors at the local level on an informal basis.
7. Utilize Department Regional Office staff to conduct "quick" on-site investigations when requested by BWWC.
8. Field investigate all filed written complaints concerning apparent well construction violations.
9. Take prompt justified or necessary action after each case is reviewed and adequately discussed.
10. Take prompt administrative or judicial action to enforce the statutes or Board rules when necessary.

**3. Program Activities.** The major activity of the board's program is the regulation and licensing of water well and monitoring drillers. The board's one authorized FTE is filled by the board's program manager who performs all daily duties and responsibilities of the board under the general direction of the BWWC. The manager's time is spent 70% on aggressively resolving complaints, which involves extensive statewide travel; 20% on licensing functions, which involves continuing education requirements, bond changes, driller/contractor status, testing and grading of exams, and licensing renewals; 10% on board meeting agenda items, board meetings and decisions; and 10% on the board's newsletter. This activity is described in more detail in the following table and notes.



<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site<sup>2</sup></u>	<u>Avg. # of new proj./yr<sup>3</sup></u>
Regulation and Licensing of Drillers	\$52,000	1	7	400	N/A	N/A

NOTES:

- Numerous other department employees and board members assist the BWWC in fulfilling its daily duties and responsibilities as follows:
  - Water Rights/Water Operations Bureau Secretary - is assigned to the board's program manager to type all correspondence, handle all in and out mail, print licenses, assist in taking Board meeting minutes, and tape all formal hearings and public rule-making hearings.
  - Water Operations Bureau Chief - oversees the budgeting and daily administrative supervision of the board's program manager.
  - Department Legal Counsel - one staff attorney is assigned to the BWWC and is responsible for assisting the Board with disciplinary actions, appeals of Board orders, filing of injunctions, attends Board meetings on an as needed basis, provides statutory and administrative rule interpretation when requested, and assists with new administrative and amendment rules and certain correspondence.
  - Department Regional Office Managers and Water Resources Specialists - when requested by the Board's Program Manager perform on-site field investigation checks on rule variances, exempt permits, unlicensed drillers and complaints.
  - Board members (5) - Board members usually attend four to six Board meetings each year, some serve on rule subcommittees, and individually become involved with special projects and complaints, which may consume considerable time.
- The total of 400 sites visited during 1995 includes: 150 well drilling sites; 100 visits to homeowners after the well is drilled; and 150 other meetings and contacts.
- The average number of new site visits has been fairly consistent the past few years, however the number has more than doubled from five years ago due to the Board's aggressive stance on resolving complaints and making more driller/homeowner contacts.

source: Guse, 1996.

**Fees and Charges.** The BWWC program has the following authority by statute to set administrative rule fees, collect bonds and seek court penalties.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Application/examination			
Contractors	\$275	\$3,575	Board expenses
Drillers	165	900	Board expenses
Monitoring Constructor	165	2,400	Board expenses
Re-Examination			
Contractor	125	250	Board expenses
Driller	75	225	Board expenses
Monitoring Constructor	75	75	Board expenses
Renewal			
Contractor	140	25,000	Board expenses
Driller	90	3,060	Board expenses
Monitoring Constructor	140	15,960	Board expenses
Late Renewal	55	550	Board expenses
Duplicate Cert/Lic.	40	0	Board expenses
Change/Cont. Name	40	0	Board expenses
Change/Resp. Cont.	40	0	Board expenses
Copies/Rules-laws	.20/page	150	Board Expenses
Additional MEPA Fees: Not Authorized		0	EIS/EA prep.
Noncompliance Penalties: Up to \$500		0	***
<b>TOTAL:</b>		<b>\$52145</b>	

**4. Regulated Communities.** The BWWC has statutory authority over all drillers and contractors. The program maintains a list of all licensed water well drillers and contractors and monitoring well contractors.

**5. Philosophical Approach to Compliance.** Generally, compliance is reasonably ensured by periodic unannounced well site field inspections, investigations of complaints, review of all filed well log reports, and required continuing educational training courses. Many alleged violations and complaints are brought to the attention of the board by other licensed driller and contractors or the general public. Also, the BWWC has a strong education, technical assistance program. Finally, it is the board's policy to aggressively pursue and resolve complaints as soon as reasonably possible.

**6. Compliance Tools Available and Used.** The menu of tools used by the BWWC Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.** According to the board and program manager, the greatest incentives for compliance with the board rules and regulations are maintaining a professional water well or monitoring business and preserving in good standing their driller's license to continue their livelihood. There is considerable peer pressure in some areas of the state where drillers are concentrated for drillers to comply. The board occasionally receives complaints from licensees concerning mainly unlicensed drillers, improper construction methods, or possible aquifer contamination.

Additionally, board rule, ARM 36.21.413A, requires a minimum of four hours of continuing education each year before their license is renewed. An average of 50 hours of qualifying education is available each year. Usually 10-12 hours can be obtained just by attending each annual drillers association convention. The continuing education requirement is a required incentive to gain new information and knowledge or a refresher course in the various aspects of the drilling industry.

Another incentive to comply is the statutory bonding requirement. If for some reason the board requires the bond be forfeited for repairing a well, it makes it increasingly difficult for the contractor/constructor to obtain another bond or its equivalent to meet the bonding requirements. A contractor/constructor cannot legally operate without a current bond or its equivalent to be approved by the board.

**8. History of Compliance.** It is the board's position, as directed by statute, that enforcement and compliance is "reasonably" being met with the resources available to the board. Data on complaints collected by the board indicates a significant reduction in the number of well owner/driller complaints in recent years as compared to previous years. This reduction is attributed to increased field inspections, quick response to complaints, increased disciplinary authority (1993 law), upgrading continuing education programs, new license orientation, and improved communication with contractors and drillers. If the past three years of activity remains similar, the board can annually expect about 50 complaints that will need investigation to some degree, and at least two disciplinary actions regarding probation or suspension of licensees.

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- BOARD OF WATER WELL CONTRACTORS PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used (95)</b>
<b>Education/Information/T.A.:</b> * Formal Continuing Education  * Written Material  * Informal Education and Technical Assistance	Four hours of continuing education is required before annual renewal of a driller's license. Courses are offered throughout the year at various locations.  A brochure and a quarterly newsletter is prepared by the BWWC and available to all licensed drillers as well as the general public.  Assistance and information is provided to all drillers and the general public from the Board and DNRC staff on a routine basis.	Board members and Program Manager  Board members and Program Manager  Routine	50 Hours Offered  Routine
<b>Comp. Planning/Withdrawals:</b> *	Not authorized		
<b>Permits/Certifications/Bonds:</b>	Bonding is required by statute before well driller licensing. The bonds may be used to remedy defects in wells.	Board and Program Manager	24
<b>Monitoring/Inspections:</b>	Inspections are conducted throughout the year as a result of complaints or as random unannounced visits at the drill site or at the business location.	Program Manager	250
<b>Administrative Notices/Orders:</b>	Board administrative notices are issued as a result of construction violations that need correction. If the violator refuses to comply or for other disciplinary reasons, the Board will conduct a formal show cause hearing, issue a proposed order, and then a final order. The final order is appealable and enforceable in District Court.	Board	5 to 10 Notices 0 Orders
<b>Admin. Penalties/Sanctions:</b> * Penalties are not authorized  * Sanctions	Penalty for late application for annual license renewal. Also, a driller's bond may be forfeited if the driller refuses to correct a construction violation.	Board and Program Manager	0

STATE COMPLIANCE/ENFORCEMENT TOOLS -- BOARD OF WATER WELL CONTRACTORS PROGRAM			
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used (95)
<b>Civil Judicial Action:</b> * Enforce Final Orders * Injunctions * Collect Misdemeanor Penalty	Civil judicial action may be taken by the Board if all other informal and administrative compliance tools fail to bring the violator into compliance.	Board	0
<b>Criminal Judicial Action:</b> Not Authorized			

**9. "Violations."** The following information is presented to illustrate the fact that violations in this program are decreasing.

Year	Licensed Drillers	Complaints	Field Investigations	Construction Violations	Enforcement Actions
1993	300	165	51	2	4 <sup>1</sup>
1994	323	212	53	2	1 <sup>2</sup>
1995	327	62	36	0	0

Notes:  
 1. Three drillers were placed on probation and one license was revoked.  
 2. One license was suspended and two drillers were taken off probation. Discovery of Violations. Violations are brought to the attention of the Board or Board's Program Manager through telephone calls or written formal concerns or complaints from licensed drillers/contractors/constructors, members of the public or the Department's Water Resources Division Regional staff. Some violations are also detected in the review of filed well log reports.

Violations Discovered, by method, 1995					
Group	Total	Agency Review of Monitoring Reports	Self-Reporting of Violation	Inspection	Citizen Complaint
Water Wells	85	5	10	10	60
Monitoring Wells	9	0	4	3	2

**10. Resolution of Noncompliances.** Any driller/contractor/constructor found not to be in compliance with a board order, statutory requirement, or administrative construction rule is promptly dealt with as each case may warrant. In general, few cases are found in violation of a board order. Most violations consist of being unlicensed or improper construction of the well. Unlicensed persons are first contacted and brought into license compliance or a court injunction is filed in district court to stop the violation and penalties may also be pursued. Most construction violations are corrected promptly by the licensee. In some cases suspension, probation or revocation of the license is necessary.

**11. Considerations in Calculating Penalties.** Penalties are provided for in MCA, 37-43-312, which consist of not more than \$500 or up to six months in jail, or both. Although this is a deterrent to violators who are unlicensed, the major deterrent to licensees is the forfeiture of their bond or equivalent, or probation, suspension or revocation of their license. The BWWC takes into account the significance of the violation based on potential impacts to human health and safety and the resource and the frequency of violations by a specific violator.

**12. Current Compliance Priorities.** The board has identified the following compliance priorities for the BWWC Program.

- Respond to all complaints or inquiries in a timely manner.
- Attempt to resolve conflicts without a filed written complaint, mainly between consumers and driller/contractors at the local level on an informal basis. The Board's Program Manager deals with these cases.
- Utilize department regional office staff to conduct quick on-site investigations when requested by the program manager to catch unlicensed drillers, collect data quickly, or process rule variances.
- Investigate all filed written complaints, typically from a consumer against a driller/contractor. These complaints are sent to the driller/contractor for a written response to the complaint. The program manager conducts on-site field investigations of all apparent well construction violations and

- prepares a report for the board.
- Take prompt action by the board after each case is reviewed and discussed as necessary in each specific case. Board action could be a decision that no well construction standards were violated; a definite violation(s) was determined and the driller/contractor is ordered to correct the construction violation; or disciplinary action will be pursued as provided in the statutes. All involved parties are informed of the board's decisions.
  - Take prompt administrative or judicial action to enforce the statutes and board rules when necessary by utilizing department legal staff or local county attorneys to initiate show-cause orders and hearings, or district court prosecution, injunctions or penalties. The board has revoked licenses, placed driller/contractors on probation, and prosecuted unlicensed drillers in district court.

### **13. Compliance Relationships with Other Agencies.**

The board will usually work closely with the Department of Environmental Quality, Department of Natural Resources and Conservation, or Montana Bureau of Mines and Geology to resolve related violations concerning water quality/quantity issues, and technical water availability and aquifer concerns. Since the board has a representative from each of these three agencies, the relationship works fairly well in a cooperative manner. There is no federal oversight over the BWWC Program and the board does not delegate any authority to any other entity.

# Dam Safety Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Dam Safety Program.

Primary constitutional and statutory authorities (see Appendix B):

- **85-15-115. Purpose.** (1) The legislature finds that dams provide a variety of benefits to the state of Montana. These benefits include the regulation of streamflows for flood control; water storage for irrigation, for municipal, industrial, and stock water consumption, and for hydropower generation; improved opportunities for flatwater recreation; and improved fisheries. Additionally, dams play a crucial role in maintaining the vitality of Montana's economy. The state therefore has a legitimate and compelling interest in encouraging the construction of dams that conform to the water storage policy provided in 85-1-703.

(2) The legislature further finds that one impediment to the construction of new dams is the potential liability associated with dam construction and operation. The legislature

understands the inherent risks to public safety associated with dam construction and operation but finds that compliance with the Montana Dam Safety Act reduces those risks to an acceptable level."

Supplemental and/or related state authorities:

- None

Related federal authorities:

- None

Specific enforcement authority:

- MCA 85-15-108, Entry Upon Land;  
85-15-215, Emergency Repairs;  
85-15-216, Permit Cancellation  
85-15-503, Civil Penalty
- ARM 36.14.101 et seq

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based upon the above-referenced guidance, the Dam Safety Program has identified the following program goals:

1. Regulate the operation and maintenance of high hazard dams.
2. Regulate the repair and new construction of high hazard dams.
3. Determine the classification of dams by analyzing their downstream hazards.
4. Conduct dam safety workshops.
5. Update and maintain a dam inventory.
6. Maintain technical expertise of staff through training.

**3. Program Activities.** The DNRC Dam Safety Program regulates 89 high-hazard dams. This regulation includes classification of dams as high-hazard, ensuring proper construction through the use of construction permits, and ensuring that the dam is properly maintained through required inspections.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr**</u>
General Program	\$205,740	2	3.5			
Hazard Classifications				10	N/A	10
Operation Permits				25	N/A	20
Construction Permits				5	N/A	6
Complaint Investigation				15	N/A	15

\* Does not include .5 FTE Bureau Chief or 1 FTE Regional Office Engineer.

\*\* Refers approximately to last 5 years.

source: Siroky, 1996.

**Fees and Charges.** Fees and penalties allowed under the statutes are required to be deposited into the general fund.

<u>Type</u>	<u>Amount</u>	Typical Annual <u>Total</u>	Allowed <u>Uses</u>
Hazard Classification	\$125	\$1,500	General fund
Permit Application	Not Authorized	N/A	
Permit Renewal	Not Authorized	N/A	
Additional MEPA Fees:	Not Authorized	N/A	EIS/EA prep.
Noncompliance Penalties:	Up to \$1,000/day	<u>0</u>	General Fund
TOTAL:		\$1,500	

**4. Regulated Communities.** Any dam that impounds at least 50 acre feet in volume and would likely cause a loss of life if it failed is required to have an operating permit. Any owner of a high-hazard dam is a member of the regulated community. Dams smaller than 50 acre feet are "regulated" only on a complaint basis and if the dam presents a danger to life or property.

**5. Philosophical Approach to Compliance.** The program defines its approach to compliance with the following phrase: Success in reasonable steps. Reluctance of owners to comply with the requirements of the law is most often economically based. The repairs required to bring a dam up to safety standards are often quite costly. When repairs can be accomplished over a period of time, rather than all at once, the staff works with owners to develop a reasonable schedule of repairs, while still maintaining the integrity of the dam. There is continual effort to work within the economic means of the owner. Unreasonable repair demands may lead to an owner's inaction and jeopardize the reservoir resource. Program staff continually communicate with dam owners through letters, telephone conversations, and personal visits. This constant communication is the program's primary method of enforcement. For the occasional reluctant owner where there is a risk of dam failure, the program has the strict enforcement provisions on which to fall back.

**6. Compliance Tools Available and Used.** The menu of tools used by the Dam Safety Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with DNRC's rules and regulations are the penalties associated with noncompliance, the potential use of grant and loan programs, and the statutory liability protection for permitted dams.

**8. History of Compliance.** The number of high-hazard dams has remained fairly constant over the past 10 years. The program staff see no increase in the number of regulated dams because of the increase in the cost of dam construction. The program saw a brief increase in the number of violations in 1985 and in 1995 due to permit deadlines.



# STATE COMPLIANCE/ENFORCEMENT TOOLS -- DAM SAFETY PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Education/Information/Technical Assistance:</b> <ul style="list-style-type: none"> <li>* Routine education and technical assistance</li> <li>* Formal Training Seminar</li> </ul>	<p>Program staff routinely provide information and technical assistance to dam owners, private engineers, the general public, and other state and federal agencies.</p> <p>Program staff organize one day long educational seminar each year regarding dam safety issues.</p>	<p>Staff</p> <p>Staff</p>	<p>Routine</p> <p>1</p>
<b>Comp Planing/Withdrawals:</b> Not Authorized			
<b>Permits/Certifications/Bonds:</b> <ul style="list-style-type: none"> <li>* Hazard Classifications</li> <li>* Construction Permits</li> <li>* Operation Permits</li> </ul>	<p>A person proposing to construct a dam 50 acre feet or larger must apply for a hazard classification determination from the DNRC.</p> <p>If the dam is determined to be a high-hazard dam, a construction permit will be required.</p> <p>After construction, the owner must apply to the DNRC for an operating permit. This permit will be granted if the dam and the operation plan complies with the Dam Safety Act.</p>	<p>Program Staff</p> <p>Program Staff</p> <p>Program Staff</p>	<p>15</p> <p>5</p> <p>25</p>
<b>Monitoring/Inspections:</b>	<p>Periodic inspections, once every five years at least, are required for all high-hazard dams. Additional inspection are required during dam construction.</p>	<p>Dam Owner</p>	<p>25</p>
<b>Administrative Notices/Orders:</b>	<p>Failure to correct a problem in accordance with DNRC requirements may lead to administrative notice or order.</p>	<p>Division Administrator</p>	<p>0</p>

STATE COMPLIANCE/ENFORCEMENT TOOLS -- DAM SAFETY PROGRAM				
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)	
<b>Admin. Penalties/Sanctions:</b> * Penalties Not Authorized * Sanctions	<p>An unsafe situation may require the DNRC to order a dam breached or require that the reservoir level be reduced or repaired. The DNRC may also undertake emergency repairs. Additionally, the DNRC may cancel a high-hazard operating permit for failure to comply with the statutes and regulations.</p> <p>A dam owner who fails to comply with the Dam Safety Act is subject to a \$1000 per day fine.</p>	Division Administrator	10	
<b>Civil Judicial Action:</b>		Division Administrator	0	
<b>Criminal Judicial Action:</b> Not Authorized				

**9. "Violations."** The Dam Safety Program defines a violation as any variance from the requirements including both structural deficiencies and permit noncompliance.

**Discovery of Violations.** Violations are identified by staff visits, engineer and owner inspections, and public complaints.

<b>Group</b>	<b>Total</b>	<b>Violations Discovered, by method, 1995<sup>1</sup></b>			
		<b>Agency Review of Monitoring Reports<sup>2</sup></b>	<b>Self-Reporting of Violation</b>	<b>Inspection<sup>3</sup></b>	<b>Citizen Complaint</b>
Operating Permits	12	2	0	7	3
Unsafe Dams	20	0	0	4	16

Notes:

1. All figures approximate for 1995. Exact data not readily available.
2. Staff review of formal private engineer's inspection reports.
3. These are not formal inspections, which are covered above, but rather staff field visits.

**10. Considerations in Calculating Penalties.** There is no official formula for calculating penalties. However, violations are generally categorized into two types: structural deficiencies and permit noncompliance. A structural deficiency is more serious as to likely impacts to life or property and the penalty would be more severe. Additionally, while the program has not experienced a frequent violator, frequent violations would likely dictate a more severe enforcement response.

**11. Resolution of Noncompliances.** Of the 89 regulated dams, 71 have operating permits. All of the 18 nonpermitted dams are pending approval and were scheduled to have permits issued in 1995. None of the nonpermitted dams are considered unsafe. Additionally, over 14 high-hazard dams are being repaired or about to be repaired due to program staff enforcement.

**12. Current Compliance Priorities.** Program staff have identified the repair of structural deficiencies having the highest risk or endangerment to life or property as priorities for the Dam Safety Program.

**13. Compliance Relationships with Other Agencies.**

Not all high-hazard dams are regulated by the DNRC. The Federal Energy Regulatory Commission regulates power generation dams, and the federal government oversees federal dams or other dams on federal property. Relationships with the federal government are generally good.

# Floodplain Management Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Floodplain Management Program.

Primary constitutional and statutory authorities (see Appendix B):

- **76-5-101. Findings.** The recurrent flooding of a portion of the state's land resources causes loss of life, damage to property, disruption of commerce and governmental services, and unsanitary conditions and the public interest necessitates management and regulation of flood-prone lands and waters in a manner consistent with sound land and water use management practices.
- **76-5-102. Policy and purposes.** Guide development of floodway areas; recognize the right and need of watercourses to periodically carry more than the normal flow of water; provide state coordination and technical assistance; coordinate federal, state, and local management activities; encourage local governmental units to manage

flood-prone lands; and provide the DNRC authority to carry out a comprehensive floodway management program for the state.

Supplemental and/or related state authorities:

- None

Related federal authorities:

- 44 CFR chp 1 Subpart B of the National Flood Insurance Program

Specific enforcement authority:

- MCA 76-5-301, Land Use Regulations;
- 76-5-302, Delegation to Local Government
- ARM - 36.15.209

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based on the above-referenced guidance, the Floodplain Management Program has identified the following program goals:

1. Conduct community assessment visits of 60 (50%) communities to evaluate compliance with the Flood Insurance Program each fiscal year.
2. Provide state priorities for floodplain and floodway delineations to the U.S.D.A. Natural Resources Conservation Service and U.S. Army Corps of Engineers and assist in the mapping projects undertaken by these agencies.
3. Identify flood prone areas to be mapped by regional office engineers and assist during the mapping process.
4. Formally adopt floodplain and floodway delineations with local communities and facilitate local community administration.
5. Provide assistance to Disaster and Emergency Services during flooding disasters.

**3. Program Activities.** In brief, the Floodplain Management Program manages both the state Floodplain Management Program and the National Flood Insurance Program. The responsibility for issuing permits remains with local governments for both programs. The DNRC is responsible for administering the programs and for general oversight of the local programs. DNRC staff individually conduct visits and contacts to approximately 50% of the 122 communities with floodplain programs each year.

Each local program's administration and enforcement provisions are reviewed by program staff. Field compliance and office documentation such as permits issued are also reviewed. Any success or problems are discussed with the local community's Floodplain Administrator.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs<sup>1</sup></u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr<sup>2</sup></u>
Community Assistance Program	\$52,800 <sup>3</sup>	0.9	5.5	122	N/A	60
Floodplain and Floodway Delineations	4,300 <sup>4</sup>	0.1	5.5	2	N/A	1-3

Notes:

1. Does not include administrative, attorney, or Bureau Chief positions.
2. Refers approximately to last 5 years.
3. Federal money. Some of these funds are used for floodplain delineation.
4. State money.

source: Siroky, 1996.

**Fees and Charges.** The program receives no fees or other charges from the regulated community.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Fees	Not Authorized	0	
Permit Renewal Fees	Not Authorized	0	
Additional MEPA Fees:	Not Authorized	0	EIS/EA prep.
Noncompliance Penalties:	Not Authorized	0	
<b>TOTAL:</b>		\$0	

**4. Regulated Communities.** The regulated community for the Floodplain Management Program includes any county, city, or town with a delineated 100-year floodplain. If a local government has a delineated 100-year floodplain in its jurisdiction and the local government fails to adopt a floodplain ordinance, the regulatory authority remains with the DNRC.

**5. Philosophical Approach to Compliance.** DNRC staff maintains regular contact with local governments. This promotes a good working relationship. The DNRC will provide assistance in rectifying any problems that develop but continued noncompliance will jeopardize the communities eligibility for federal disaster aid and flood insurance.

**6. Compliance Tools Available and Used.** The menu of tools used by the Floodplain Management Program to achieve their natural resource/environmental mandates is shown beginning on the next page.

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with DNRC's rules and regulations are as follows. Communities that fail to adopt and enforce a floodplain management ordinance required by the NFIP jeopardize their eligibility to receive any disaster assistance, financial or otherwise, from the federal government in the event of a flood disaster. The DNRC is required to issue building permits and oversee development of delineated floodplain and floodway if the local government fails to adopt and enforce flood ordinances. Home owners cannot receive federal federally guaranteed home loans within delineated floodplain if the local government fails to adopt flood ordinances. Additionally, banks and other lending institutions have adopted their own policies concerning nonfederal loans for buildings within flood prone areas.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- FLOODPLAIN MANAGEMENT PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
<b>Education/Information:</b> * Lender/Agent Seminars * Floodplain Administrator Workshops * Semi-Annual Newsletter * Technical Bulletins * Technical Assistance Phone Calls Written	Providing education, information, and technical assistance is the main function of the program.	Program Staff Program Staff Program Staff Program Staff Program Staff	3 4 2 7 3000 + 210
<b>Comp.Planning/Withdrawals:</b> Not Authorized			
<b>Permits/Certifications/Bonds:</b>	The DNRC has limited authority to issue floodplain development permits. This usually occurs at the local government level unless the local government is under sanction and the permit authority has reverted back to the DNRC.		3
<b>Monitoring/Inspections:</b>	Community evaluations each year for approximately 50% of communities with floodplain management programs.	Program Staff	60
<b>Administrative Notices/Orders:</b> * Public Notices of Floodplain Delineations * Other Written Notifications	The DNRC is required to inform the public regarding floodplain delineations.  Additionally, the DNRC is required to notify communities and individuals when a development represents a potential violation of floodplain regulations.	Program Staff Program Staff	3 12

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- FLOODPLAIN MANAGEMENT PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Admin. Penalties/Sanctions:</b> * Penalties Not Authorized * Sanctions	<p>The DNRC is required to take floodplain management authority from a local government if the local government fails to adopt or enforce required floodplain ordinances.</p>	DNRC Director	7 Counties
<b>Civil Judicial Action:</b> Not Authorized	<p>The DNRC is not authorized to take civil judicial action but program staff do provide technical support to local government attorneys about 25 times each year.</p>		
<b>Criminal Judicial Action:</b> Not Authorized			

**8. History of Compliance.** Program staff indicate that the number of floodplain management violations has been increasing due to an increase in both population and the resulting development pressure within flood prone areas.

**9. "Violations."** There are approximately 12 violations or potential violations that occur every in the Floodplain Management Program. Due to the fact that the local government is responsible for administering the local floodplain management program, the DNRC does not document all potential violations.

On average, 10 of the 12 violations are due to construction projects being initiated prior to the issuance of a floodplain development permit from the local administrator. These violations are remedied at the local level by requiring the property owner to obtain a permit as soon as possible. Usually 1 violation will result from a project being completed without a permit. Again, the property owner is required to obtain a permit and to ensure that the completed project meets the floodplain management requirements. Project removal is possible if the project can not be brought into compliance. An additional possibility is that, after further review, the area that has been developed, or that is about to be developed, may be determined not to be in the floodplain. In that case no floodplain development permits are required.

**Discovery of Violations.** Violations are identified by on-site inspections, review of reports, citizen complaints, or local identification.

<u>Group</u>	<u>Total</u>	<u>Violations Discovered, by method, 1995</u>			
		<u>Agency Review of</u> <u>Monitoring Reports</u>	<u>Self-Reporting</u> <u>of Violation</u>	<u>Inspection</u>	<u>Citizen</u> <u>Complaint</u>
General Violations	12	0	4	2	6

**10. Considerations in Calculating Penalties.** There is no official formula use to calculate penalties. However, the DNRC will consider the following factors in selecting an enforcement response:

- Location of the violation, e.g., in the flood fringe or the floodway itself;
- Potential impacts resulting from the violation in the event of a 100-year flood, giving special attention to negative health and safety impacts;
- Identity of the violator, was the violator a unit of government or an individual;
- If after two written contacts the problem is not corrected, the floodplain administrator will turn the problem over to local legal staff.

**11. Resolution of Noncompliances.** See the information above under number "9. Violations".

**12. Current Compliance Priorities.** Program staff have identified floodplain management violations that impact human health or present a threat to life or property as priorities for the Floodplain Management Program.



### **13. Compliance Relationships with Other Agencies.**

**Oversight.** There is federal oversight in that most of the money for the program comes from the federal government. Additionally, the federal regulations serve as minimum standards. State floodplain regulations that are more stringent than federal regulations supersede federal regulations.

**Partnerships.** The DNRC also works closely with the Federal Emergency Management Agency and the Montana Disaster and Emergency Services in flooding problems. Additionally, the National Flood Insurance Program provides flood insurance to those areas enforcing floodplain regulations.

**Delegated Authority.** The DNRC does not delegate any authority to local governments. State law grants local governments the authority to adopt floodplain ordinances.

# Water Measurement Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Water Measurement Program.

Primary constitutional and statutory authorities (see Appendix B):

- **85-2-150. Chronically dewatered watercourse -- identification.** The department shall identify chronically dewatered watercourses or portions of watercourses.

Supplemental and/or related state authorities:

- 85-2-113(4), MCA Department powers and duties include the authority to require measuring devices on chronically dewatered watercourses.

Related federal authorities:

- None

Specific enforcement authority:

- MCA 85-2-122, Penalties
- ARM 36.13.401

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based on the above-referenced guidance, the Water Measurement Program has identified the following program goals:

1. Identify chronically dewatered watercourses.
2. Monitor compliance of the requirement for headgates and measuring devices within two years of chronically dewatered designation.

**3. Program Activities.** The DNRC is required to identify chronically dewatered watercourses. Once identified as chronically dewatered, measuring devices are required on all water diversions.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr**</u>
General Program	\$37,300	1	2.5	3	N/A	3-5 Streams

\* Does not include administrative, attorney, Bureau Chief positions.

\*\* Refers approximately to last 5 years.

source: Siroky, 1996.

**Fees and Charges.** The program receives no fees or other charges from the regulated community.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Fees	Not Authorized	0	
Permit Renewal Fees	Not Authorized	0	
Additional MEPA Fees:	Not Authorized	0	EIS/EA prep.
Noncompliance Penalties <sup>1</sup> :	\$1,000/day	0	
<b>TOTAL:</b>		\$0	

Notes:

1. Any penalties collected must be deposited into the DNRC enforcement fund.

**4. Regulated Communities.** The regulated community for the Water Measurement Program would be individuals diverting water from a watercourse that has been identified as chronically dewatered. The DNRC would use water right and water use permit records to identify those individuals. Currently two watercourses have been identified as chronically dewatered: Mill creek near Livingston and the

**5. Philosophical Approach to Compliance.** Program staff work with water users to achieve compliance through workshops and technical assistance. Judicial enforcement will be initiated only after the prescribed administrative process has been exhausted. Compliance is facilitated by public participation in the chronically dewatered identification process. A decision by the DNRC to declare a watercourse chronically dewatered is preceded by a report addressing several factors relating to water use and impacts. Information for the report is developed through public meetings as well as researching data and information concerning the watercourse, including stream flow records, water rights, water uses, and the extent, duration, and frequency of dewatering.

**6. Incentives for Compliance.** According to program staff, the greatest incentive for compliance with DNRC's rules and regulations is an understanding by water users that with water measurement and better water management, more water is available for all water users. Additionally, the statutory penalties provide a financial incentive as does the program's technical assistance.

**7. Compliance Tools Available and Used.** The menu of tools used by the Water Measurement Program to achieve its natural resource/environmental mandates is shown beginning on the next page.

# STATE COMPLIANCE/ENFORCEMENT TOOLS -- WATER MEASUREMENT PROGRAM

Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)
Education/Information/Technical Assistance:	Understanding that compliance after chronically dewatered designation is largely dependant on public involvement during the identification process, program staff concentrates on providing the maximum amount of education, information, and assistance early in the process. On-site public meetings are held at every stage of the identification process and a written final study is published.	Program Staff	Routine
Comp. Planning/Withdrawal: Not Authorized			
Permits/Certifications/Bonds: Not Authorized			
Monitoring/Inspections:	After identification as a chronically dewatered watercourse, program staff will monitor and inspect diversion devices to ensure compliance with the requirements.	Program Staff	0 <sup>1</sup>
Administrative Notices/Orders:	DNRC staff will probably issue an administrative order to those water users who, after informal communications and warnings, fail to comply with statutory requirements.	Division Administrator	0
Admin. Penalties/Sanctions: Not Authorized			0
Civil Judicial Action:	A person who violates a provision of the water use statutes may be prosecuted for a misdemeanor offense. The maximum penalty is \$1,000 per day.	Division Administrator	0
Criminal Judicial Action: Not Authorized			0

Notes:

<sup>1</sup> No enforcement action was taken in 1995 because the two year post-identification period had not expired on either identified watercourse.

**8. History of Compliance.** Because the two year deadline for the installation of measuring devices has just been reached on one watercourse, the DNRC has not yet been required to enforce compliance with the water measurement law. Measuring devices are required on Mill Creek by April 15, 1996 and on the Musselshell River by April 1, 1997.

**9. Discovery of Violations.** The DNRC anticipates that violations will be identified through on-site inspections, review of water measurement reports, and citizen complaints.

**10. Considerations in Calculating Penalties.** Currently the DNRC has no written enforcement policy for the Water Measurement Program. The DNRC Administrative Policy No. 3, *Conflict Resolution and Enforcement Actions Under the Water Use Act*, will control any enforcement action taken by the Water Measurement Program. This administrative policy prioritizes various violations and recommends appropriate enforcement action for each level of violation.

**11. Resolution of Noncompliances.** This is not applicable since no enforcement action has taken place.

**12. Current Compliance Priorities.** Agency staff have identified the two watercourses currently identified as chronically dewatered as priorities for the program.

**13. Compliance Relationships with Other Agencies.** Program staff indicate that, while they have no formal relationship with other agencies, they enjoy a good working relationship with the Department of Fish, Wildlife & Parks and local government entities.

# Water Rights Program

**1. Constitutional and Statutory Goals.** The following provides a guide to the constitutional, statutory, federal, and rule authority for the activities of the Water Rights Program.

Primary constitutional and statutory authorities (see Appendix B):

- **Constitution Article IX, Section 3:** "(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.  
(2) The use of all water appropriated for beneficial use, the right of way over the lands of others for [improvements] necessarily used in connection therewith, and the sites for reservoirs shall be held to be a public use.  
(3) All waters are subject to appropriation for beneficial uses as provided by law.  
(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.
- **85-2-101. Declaration of policy and purpose.** The legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.

Supplemental and/or related state authorities:

- None

Related federal authorities:

- None

Specific enforcement authority:

- MCA 85-2-114, Judicial Enforcement;
- 85-2-115, Entry on Land;
- 85-2-116, Legal Assistance;
- 85-2-122, Penalties
- MCA Enforcement Authority Continued:
- 85-2-314, Revocation or modification of Permit
- 85-2-402(10) Revocation or Modification of Change Authorizations
- 85-2-431, Penalty (Failure to file water right transfer)
- 85-2-505, Waste and contamination of ground water
- 85-2-507(6) Limiting withdrawals - modification of order
- 85-2-514, Inspection of wells
- 85-2-250, Penalties
- A Water Rights Bureau policy entitled "*Conflict Resolution and Enforcement Action Under the Water Use Act*" is used to address water right compliance issues.

Primacy and jurisdictional agreements:

- None

**2. Program Goals.** Based upon the above-referenced guidance, the Water Rights Program has identified the following program goals:

1. Administer the Montana Water Use Act passed in March 1973, which includes administering laws which govern the diversion, withdrawal, and use of water.
2. Establish and maintain a centralized water rights record of permits, certificates, declarations, applications, and other water right documents filed with the department.
3. Document, protect, preserve, and develop Montana's water for the state and its citizens.
4. Determine if water use malpractice exists and mobilize remedies to alleged malpractice.
5. Provide information and assistance as part of the statewide adjudication to the water judges in their adjudication of claims.

### 3. Program Activities.

<u>Program Activities</u>	<u>FY 96 Budget</u>	<u>FY 96 FTEs*</u>	<u>Avg. Years Staff Retntn.</u>	<u>1995 Ongoing Projects/Sites</u>	<u>Avg. Acres/ Site</u>	<u>Avg. # of new proj./yr**</u>
Complaints	\$89,295	2.2	19.6	95	N/A	N/A
New						
Appropriations	1,063,421	26.2	14.8	4080	N/A	N/A
Records						
Management	633,182	15.6	10.4	250,000	N/A	N/A
Adjudication	576,358	14.2	10.6	7,271	N/A	N/A
Other	81,177	2.0	17			

\* Does not include administrative, attorney, or Bureau Chief positions.

\*\* Refers approximately to last 5 years.

source: Holman, 1996.

**Fees and Charges.** An application fee is collected for all permit and change applications. In addition, a notice of completion fee is collected for issuing water right certificates for ground water development. A water right transfer fee is also collected. The total amount of fees collected during FY 95 was \$284,867.

<u>Type</u>	<u>Amount</u>	<u>Typical Annual Total</u>	<u>Allowed Uses</u>
Permit Application Fees:	\$100	\$63,000	General Program Support
Notice of Completion Fees:	25	80,000	
Water Right Transfer Fees:	varies <sup>1</sup>	135,000	
Other Fees: <sup>2</sup>	varies	6,000	
Additional MEPA Fees:	Not authorized	0	
Non-Compliance Penalties:	1,000/day	0	
<b>TOTAL:</b>		<b>284,000</b>	

**Notes:**

1. \$25 for the first transfer and \$5 for each additional transfer up to a maximum of \$50.

2. Other fees include exempt rights, objections, renewal for temporary changes, and copying fees.

**4. Regulated Communities.** Any appropriator of water is a member of the regulated community. This includes about 181,000 water users who have water rights permits, water right claims, water right certificates, or reserved water rights.

**5. Philosophical Approach to Compliance.** The means employed to handle complaints are outlined in the *Conflict Resolution and Enforcement Action Under the Water Use Act* policy. The DNRC relies almost exclusively on formal complaints before it actively pursues compliance of a water rights violation. The DNRC prefers to not meddle with those uses of water that may technically be violations, but are not deemed adverse to the well-being of the affected interests. The DNRC expects the complaining party to make a call on a junior user if the complaining party alleges their senior rights are adversely affected. In this way communication and resolution is promoted at the local level and among the affected interests. The policy also encourages mediation whenever possible to resolve complaints. The DNRC disseminates information and tries to educate water users on how water law may apply to their situation and how the department's enforcement policy works. The public often relies on the DNRC to assist with problem solving. When the violator makes significant strides to comply, the DNRC resists levying fines.

The requirement for a formal complaint reduces the incidents where a person fabricates a water rights complaint in order to coerce the DNRC to serve on behalf of the complainant.

In some situations when a violation is occurring, a senior user will forego complaining and enforcement because he wants to get-along with his neighbor. For many senior water users, it's more important to preserve social unity, sustain an effective dialogue, and maintain a congenial demeanor. They refrain from complaining if a complaint may lead to economic adversity and discontent for their neighbors.

**6. Compliance Tools Available and Used.** One of the preventative measures employed by the DNRC is sending letters and notices to users advising them of a senior's approaching appropriation of water. Informal meetings and telephone calls are useful avenues to advise water users of potential violations. The DNRC provides senior users with information so they can inform junior users of impending water shortages or to make a call on a junior user. The exchange of information with permittees is usually productive in that they generally cease appropriating and yield to the senior water rights. The administrative water right holders understand that if they violate the provisions of their permit, the DNRC has authority to revoke or modify the permit.

Violations involving existing water rights are generally more difficult to handle. The final adjudication of existing water rights has not concluded. Consequently the extent of the existing water right is not finally determined. With uncertain existing water rights, a district court will usually become involved when it is petitioned by a complainant to determine who and what water can be appropriated to resolve a local conflict.

The DNRC is less inclined to commit time and resources on issues involving existing water rights that will likely migrate to the jurisdiction of the district court or the water court. When an existing water right is in dispute, the DNRC is reluctant to use its staff to petition the district court for relief for one of the parties. The DNRC feels the parties have the same opportunity and sufficient understanding of the issues to file suit in district court. The DNRC chooses to not provide legal counsel or serve as a filter or buffer on behalf of a party engaged in a dispute that will ultimately require district court action.

In all situations involving either administrative or existing water rights, the DNRC encourages disputing parties to mediate and offers information and records to help settle conflicts. The DNRC always encourages people to contact regional offices for explanation of water rights law and records. If the DNRC investigates a formal complaint and determines a violation is occurring, the alleged violator is advised of the potential consequences for violating. When a violator understands the repercussions of a violation, they usually listen and find a means to cease violating.

Some major tools that assist the DNRC in their approach to effective water rights enforcement tools are shown in the table on the next page.



**STATE COMPLIANCE/ENFORCEMENT TOOLS -- WATER RIGHTS PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Education/Information/T.A.:</b> * Formal Activities  * Other Activities	<p>The program sponsors workshops where the public learn about water rights, water distribution, water measurement and related activities.</p> <p>Providing information and technical assistance is a large part of the program staff's daily responsibilities.</p>	<p>Program Staff</p> <p>Program Staff</p>	<p>15</p> <p>Routine</p>
<b>Comp. Planning/Withdrawals:</b> Not Authorized			
<b>Permits/Certifications/Bonds:</b> * Application Review  * Notice of Pending Applications  * Contested Case Hearings	<p>The Water Rights staff reviews many applications that are not approved. The failure of the applicants to prove the criteria for issuance of a permit or change is a tool that teaches the applicants what compliance is required for water use.</p> <p>Notices of pending applications are sent to water users advising them of the potential development. About 600 applications are received annually. Individual notice is provided to an estimated 2 persons for each application.</p> <p>The Water Rights Bureau schedules approximately 35 contested case hearings annually. Notices are sent to water users who object to applications that may impact their water use.</p>	<p>Regional Managers</p> <p>Program Staff</p> <p>Hearings Examiner</p>	<p>200</p> <p>1260</p> <p>2</p>
* Application Approval or Modification	When the statutory criteria have been met the DNRC will approve or approve with modification an application.	Regional Managers	350

STATE COMPLIANCE/ENFORCEMENT TOOLS -- WATER RIGHTS PROGRAM				
Tools Authorized	"Trigger" (When Used?)	Authority to Complete	Times Used? (95)	
<b>Monitoring/Inspections:</b> * Field Investigations  * Claims examinations  * Verification of Permits and Changes	The Water Rights Bureau conducts an estimated 100 field investigations annually. From the filed investigations issues and problems with compliance may be observed.	Regional Staff	100	
	Claim examination inquiries where the public exchanges information with DNRC staff on water rights and the prior appropriation system;	Program Staff	7270	
	The Water Rights staff verifies water use developments annually. A development that is not completed in accordance with is noted and arrangements to achieve compliance with the developer are made.	Regional Staff	200	
<b>Administrative Notices/Orders:</b> * Informal meetings  * Informal Contacts with individual water users  * Informal Mediation  * Show Cause Hearings	This activity includes attendance by DNRC staff at annual meetings for irrigation districts and companies.	Program Staff	15	
	The Water Rights staff throughout the regional offices likely converse with 80 water users daily. Over a year many water rights issues, questions and concerns are addressed.	Program Staff	20,000	
	The Water Rights Bureau attempts to resolve conflicts and issues regarding water right conflicts through informal mediation. Frequently the mediation will include an explanation of the law and how it is to be followed.	Regional Managers	150	
	An estimated 2 show-cause hearings are held by the Department annually. Notice and parties are acquainted with water right issues at these hearings.	Hearings Examiner	2	
<b>Admin. Penalties/Sanctions:</b> * Penalties Not Authorized  * Sanctions Permit Termination	The Water Rights staff terminates several permits for failure of the permittee to develop in accordance with the granted permit annually.	Central Office Staff	110	

**STATE COMPLIANCE/ENFORCEMENT TOOLS -- WATER RIGHTS PROGRAM**

<b>Tools Authorized</b>	<b>"Trigger" (When Used?)</b>	<b>Authority to Complete</b>	<b>Times Used? (95)</b>
<b>Civil Judicial Action:</b>	A person who violates a provision of the water use statutes may be prosecuted for a misdemeanor offense. The maximum penalty is \$1,000 per day.	Division Administrator	1
<b>Criminal Judicial Action:</b> Not Authorized			

**7. Incentives for Compliance.** According to program staff, the greatest incentives for compliance with DNRC's rules and regulations are the potential fines that may be levied if a violation occurs. The possibility of revocation triggers water users to comply also. The various education efforts are useful in promoting compliance. The only financial incentive is probably the fine that may be levied upon a violator. There are no financial or administrative incentives that are offered to users as a bonus for complying with the law. As noted under number 5, "Philosophical Approach to Compliance," there are some situations when a violation is occurring and a senior user will forego complaining and enforcement because he wants to get-along with his neighbor. For many senior water users, it's more important to preserve social unity, sustain an effective dialogue, and maintain a congenial demeanor. They refrain from complaining if a complaint may lead to economic adversity and discontent for their neighbors.

**8. History of Compliance.** The cataloging of enforcement and compliance situations is not centralized. Each regional office maintains files of complaints received and the correspondence and activity associated with resolving the issue. In addition several of the complaints that require guidance and assistance from the central office staff may have files prepared and referenced for related or repeated offenses.

The general feeling is that compliance remains a problem. Many if not most water users may be violating some part of the law. However, with the potential fine of \$1,000 per day, the ability to resolve issues and achieve compliance appears to be improving. The number of complaints is probably not increasing. However, the amount of seasonal moisture is probably inversely related to the number of complaints received by the department.

**9. "Violations."** The regional office may receive 500 phone calls or letters alleging violations annually. However, the bulk of the complaints are resolved by telephone. The number that require several contacts, correspondence or investigation are estimated to be about 95 annually.

**Discovery of Violations.** Violations are identified through various means including: complaints received from the public, staff observations, unusual information included in an application or an objection, informal discussions with water users, testimony or evidence presented at a hearing, questions by water users asked at various events, inspection of aerial photos or pictures as part of a verification of a water use, and investigation of other types of violations. This information is not conveniently available or catalogued. The bulk of violations are discovered from public complaints of alleged wrongful water use. Several violations are discovered by staff traveling and conducting field investigations. Frequently the field investigation will identify a situation, issue or violation totally unrelated to the purpose and exercise of the water right under investigation. For example, the flow rate for a diversion may be measured, and the investigator observes an uncontrolled flowing well while traveling to the field site. The field investigation will likely find no problem with a flow rate, but the waste of water from an uncontrolled flowing well is likely a violation of the law.

**10. Considerations in Calculating Penalties.** No official formula exists for calculating penalty amounts, but the DNRC Water Rights Program considers the severity of the violation based on potential violation impacts. The frequency of the violation is not considered in selecting the enforcement response. If the violator will not correct the violation, the DNRC will seek judicial enforcement.

**11. Resolution of Noncompliances.** Individuals who have been found to not be in compliance with statutory requirements may be levied a fine. The department has levied about 5 fines since the fine was implemented into the law. In all but one situation, compliance occurred almost immediately after the fine was levied. In the one case, department action was effectively stayed because district jurisdiction related to the other matters involving the case took precedent.

**12. Current Compliance Priorities.** Agency staff have identified the following priorities for the Water Rights Program.

- Developing an effective and efficient water rights transfer procedure.
- Investigating potential options for improving the efficiency of the water rights change process.

**13. Compliance Relationships with Other Agencies.**

**Oversight.** There is no oversight group that shares compliance responsibilities for water right conflicts and violations with the department.

**Partnerships.** The rules and responsibilities of the Water Rights Bureau's enforcement program are stated in Administrative Policy No. 3, *Conflict Resolution and Enforcement Action Under the Water Use Act.* Other agencies or divisions such as the Department of Fish, Wildlife & Parks; the Department of Natural Resources and Conservation, Trust Land Management Division; and the Department of Environmental Quality, who deal with water right issues, are aware of the Water Rights Program's enforcement authority. They frequently contact the DNRC staff for clarification of situations that may fall under the policy. Some agencies also take preventive measures to assist the public with avoiding a violation such as sending letters to water users and requesting to have remarks placed on permits and changes that may be issued by the DNRC.

**Delegated Authority.** The regional offices have considerable authority in determining what and how enforcement should be achieved. They frequently consult with central management staff in Helena to receive guidance and assistance in resolving violations.



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## SECTION 3: CONSULTATION WITH OTHER STATES

### Introduction

One of the 1995 Legislature's requests of the Environmental Quality Council set forth in House Joint Resolution 10 was:

*(2) That the study include but not be limited to a review and analysis of: (D) other states' natural resource and environmental agencies' attempts to improve and measure compliance and enforcement.*

A presentation was made to the EQC which summarized the staff's research on this item. Several attachments were included with the original presentation which are not available here. They were:

- excerpts from a presentation in *The International Conference on Environmental Enforcement*, Amsterdam, Netherlands, 1990, by Carol Wasserman, EPA, Washington, D.C., Office of Enforcement and Compliance Assurance.
- *Policy, Guidance, and Standard Operating Procedures for Oversight of Hazardous Waste Compliance Monitoring and Enforcement Programs*, USEPA Region 8, Nov. 1993.
- *Executive Summary, Prospective Indicators for State Use in Performance Agreements*, State Environmental Goals and Indicators Project, Florida Center for Public Management, August 1995.
- *Summaries of State Environmental Indicator Initiatives with Completed Reports*, State Environmental Goals and Indicators Project, Florida Center for Public Management, Oct 1995.
- excerpts and examples of environmental measurements from the following reports: *Utah Tomorrow Strategic Plan*, 1995; *Strategic Assessment of Florida's Environment (SAFE)*, Nov 1994; *Oregon Benchmarks*, Oregon Progress Board, Dec. 1994; *State Agency Strategic Plan*, Wyoming Dept. of Environmental Quality, Sept 1995; *Washington's Environmental Health 1995*, Washington Dept. of Ecology; and *The Montana 305(b) Report*, June 1994, Water Quality Division, Mont. Dept of Health and Environmental Sciences (DEQ).

These attachments are available at the EQC office. The matrix at the end of this section has been proposed by the Environmental Protection Agency for state program performance measurements.

# Compliance and Enforcement Improvement and Measurement Methods...Other States

## Objective

The Council adopted this goal (Goal 6) for the study:

*Identify the methods other states use to improve and measure compliance and enforcement with their state natural resource and environmental laws.*

## Approach

The EQC staff contacted 13 other states in the Montana region and elsewhere to gather information, focussing on those states using a "benchmark" approach to measuring compliance. Typically, the staff contacted environmental quality agency director's offices and held discussions with directors or their policy advisors.

The staff also contacted nationwide groups such as the Environmental Council of States, National Association of Attorneys General, Environmental Law Institute, Council of State Governments, National Council of State Legislatures, Conference of Western Attorneys General, Florida Center for Public Management, and the federal Environmental Protection Agency.

## Results

### *No Simple Solutions*

A search for a universal "thermometer" or yardstick proved fruitless. Each state is grappling with the same issues that confront Montana in evaluating natural resource and environmental programs. The difficulty becomes especially obvious when one measures program efforts and then attempts to relate those efforts to resource or environmental quality. The parameters which are commonly used as yardsticks for measuring compliance and enforcement results include;

- environmental results
- compliance rates
- progress in returning significant violators to compliance
- measures of compliance monitoring
- number of enforcement responses
- timeliness of enforcement responses
- monetary penalties assessed
- measures of technical assistance

A more thorough discussion of the positive and negative attributes for each parameter is available from the EQC office.

## *Two Separate Efforts*

A: "natural resource" and

B: "environmental laws"

Natural resource laws tend to be state specific. Program efforts, goals, and funding are issues left more to the desires of the public and the discretion of the policy makers in each state. These programs are generally organized within a state Department of Natural Resources-type agency with responsibilities for state grasslands, deserts, forests, water quantity, recreation, wildlife, state land use, seashores, and other natural or biological resources unique to each state. As such, laws and goals vary as do accomplishments and the measurements of those accomplishments. So it was not surprising that methods for measuring compliance and enforcement in these natural resource programs were not clearly definable or compartmentalized into a transferable technology. The primary focus of this study review was with the environmental pollution control programs.

Also, with some exceptions, most of the natural resource management programs do not have a very strong compliance and enforcement component. Generally, they seek to manage natural resources by modifying behavior of the public simply by enacting a state policy and providing information and education.

Environmental laws, on the other hand, tend to be state responses to national issues and legislation in the areas of water quality, air quality, solid and hazardous waste management, pesticides, toxics, radiation and others. These programs often do have strong compliance and enforcement components. Generally, they seek to manage the environment by modifying the behavior of business and industry as well as individuals.

Environmental program efforts and goals are not necessarily state originated or designed. With significant grant funding from the federal government through the Environmental Protection Agency, the state's program performance responsibilities have been and still are directed in large part by the EPA. Current percentages of federal EPA funding of these programs are:

Air pollution program	60% federal dollars
Solid waste	75%
Hazardous waste	75%
Toxic substance control	75%
Underground storage tanks	75%
Public water supply	75%
Underground injection wells	75%
Ground water/wellhead protection	100%
Nonpoint source water programs	60%
Superfund remediation	90%
Underground tank remediation	90%
Radon gas programs	50%

These federal grant programs are negotiated with states each fiscal year using a multitude of policy guidance documents developed over the years mostly by EPA. Successful negotiation of each grant for each program results in a State/EPA Agreement which lists the duties and responsibilities of both parties over the course of the grant term.

Integral to these agreements are the performance measures states report to EPA for their various programs. Compliance monitoring and enforcement guidance documents exist for each program, which list EPA's expectations of the state's response action and resolution of violations and the state's plan to

require compliance with the program's requirements. Typically then, the methods other states use to improve and measure compliance and enforcement with their environmental laws are fairly standard, having been negotiated with the EPA as a condition for grant funding.

These measures have traditionally tracked program effort or activity, counting things such as the number of inspections conducted; number of violations noted; number of permits issued, suspended, revoked, and denied; number of enforcement actions taken; number of warning letters, administrative orders issued, or civil or criminal cases filed; and the amount of penalties assessed.

### **Program Improvement**

The other component to this study review is to discover what methods are used to improve program compliance and enforcement. Almost universally, states and the federal EPA acknowledge that counting program effort alone is not a satisfactory method of measuring compliance. Activity measurements are important from a program performance and budgeting standpoint if one is trying to match fiscal and human resources to an anticipated workload. However, they may not have a direct link to on the ground environmental measurements.

For example, one can assume that the Los Angeles County Air Pollution Control District would have a very long list of program activity measurements as compared to that from Wyoming. A comparison between the two of number of violations found, number of permits issued, number of inspections conducted, and other program efforts would be heavily weighted toward the California agency. Does that mean that the air quality in Los Angeles is better than it is in Wyoming?

For the last few years, alternative approaches to compliance and enforcement measurement are being discussed and attempted on at least a trial basis. The EPA and some states are developing prototype multi-media Performance Partnership Agreements (PPF) to replace the single media (air, water, waste, etc), single grant State/EPA Agreements. Under these new agreements, federal dollars are provided as "block grants". States are allowed more flexibility in determining where their co-mingled federal grant funds are spent. EPA oversight of state programs is reduced, and states provide the EPA with the compliance and enforcement measures which the states feel are important. States must first provide a self assessment to convince the EPA that their environmental programs are well developed and capable of making continued progress.

Colorado, Utah, Delaware and Illinois have signed these agreements. Eleven other states have expressed interest in participating, including Arizona, Georgia, Indiana, Kentucky, Minnesota, New Jersey, Ohio, Oregon, Texas, Washington, and Wisconsin.

### **Indicators as Measures**

Although not required by the EPA, one of the common components of states involved in the PPF process is program performance measurement through the use of environmental indicators. There seems to be widespread acceptance of the concept that on the ground measurements of environmental results and trends is a more desirable measure of the success of an environmental program than the traditional method of counting program activities. The EPA is sponsoring a State Environmental Goals and Indicators Project conducted by Florida State University which has the following objectives:

- increase the number of state environmental agencies that are effectively utilizing environmental goals and indicators,

- elevate the quality of state agency environmental indicator systems,
- improve the integration of environmental goals and indicators with other environmental management tools, techniques and methodologies, and
- establish a network of policymaking and technical professionals from all state environmental agencies who have a broad interest in environmental management and a specific interest in goals and indicators.

Part of this effort includes an attempt to develop a list of appropriate environmental indicators the states could use to report program progress and success to the EPA. In the future, will the EPA abandon the traditional program activity type reporting in favor of measuring environmental quality indicators? It's not likely that program activity measures will be forsaken, but they are more likely to be supplemented with indicator measurements in an effort to link the two together.

A list of states that have completed an environmental indicators report or have established a process by which to measure environmental conditions is available from the LEPO office. Three states, Connecticut, Minnesota, and Oregon, have benchmark programs which establish desired future goals and then list specific measurable indicators which are intended to help determine whether or not the goals are reached. Examples of program's that use environmental benchmarks and indicators, including Montana's Water Quality Program, were made available for review by the Council.

### **Compliance Techniques and Philosophy**

Most states contacted placed a much stronger emphasis on obtaining compliance through any and all means other than enforcement. Colorado officials define a successful enforcement program as one with the most compliance and least violations rather than the one with the most violations counted or legal actions taken. Oklahoma officials stated that they measure program success in part on how few times they are forced to use a fine. The terms "compliance assistance" and "customer service" were commonly mentioned by states as a philosophy currently receiving increasing emphasis.

Indiana is experimenting with a general facility permit which lists all the environmental requirements the facility is subject to and certifies specifically how the facility proposes to meet them. The Indiana air quality program permits have a money back guarantee if they are not issued within specified time frames. The most common environmental violations in each program are identified and workshops are held with the regulated communities to explain how best to comply.

Colorado is entering into a Performance Partnership Agreement with the EPA this year which emphasizes three components: compliance assistance, pollution prevention, and customer service.

Utah created a temporary air pollution permit amnesty program when it discovered significant noncompliance by the regulated community and learned that the fear of penalty for not applying by the original deadline was the major reason for noncompliance. Program staff are also making a concerted effort to act as "mini-consultants" to small businesses which can't afford to hire others to help them through technical permit or compliance processes.

Education programs in schools, media efforts, sponsored workshops conducted by industry trade associations, on site walk-through audits (as opposed to enforcement inspections) by staff were mentioned often. Pollution prevention programs are emphasized in all states contacted.

Voluntary self-auditing of permitted businesses was mentioned as an incentive to obtain compliance. The incentive to conduct audits and correct violations is the agency's grant of immunity, partial immunity, and/or the provision of privilege which allows audit discoveries to remain private.

The EPA is also trying to provide alternative methods intended to obtain environmental compliance. Within the last two years, the EPA has issued a new *Policy on Flexible State Enforcement Response to Small Community Violations*, *Clean Air Sec. 507 Small Business Assistance Program Enforcement Response Policy*, and the *Small Business Compliance Incentives Policy*. All are intended to de-emphasize the enforcement role of state and federal programs and encourage flexibility in obtaining cooperative compliance.

Outside the United States, Norway has a policy of inspecting some industries more than others. They are identified as class 1 through 4 depending on their actual or potential emissions, their toxicity, and the environmental sensitivity of the surrounding area (human receptors, biological receptors, air, water or soils). Industries pay standard fees for the inspections, with follow-up inspections costing more. Also, an effort to develop, train and use industry specific inspectors is being attempted. For example, there are inspectors for the refinery industry who can advise, inspect, train, and otherwise relate to the industry for all environmental parameters: air, water, waste, etc.

### Summary

Other states are having similar difficulties in measuring compliance and enforcement within their natural resource and environmental laws. No universal study could be found which provided a methodology that worked differently or any better than what is in use today. The federal EPA and the states have a long history of negotiating what the terms "timely, appropriate, and effective" compliance and enforcement mean. The measurements have traditionally been quantitative counts of program efforts. These are relatively easy to measure and provide numbers which can be used to make management decisions. The Council received this type of information in the course of the agency presentations.

The need to provide some measure of environmental quality is currently being discussed in state and federal programs. Qualitative measurements of environmental conditions and trends through some defined and measurable environmental indicators are receiving more emphasis as a methodology. This is a national planning effort which may or may not go forward over the next several years. Several states have proceeded on their own. The efforts are new and do not yet show strong environmental trends. The link between the two--program compliance and enforcement activity counts and environmental quality--while apparent, can be very difficult to measure.

The Washington D.C. EPA Office of Enforcement and Compliance Assurance (OECA), after working with the states and specific EPA pollution control programs has developed the following "Top 10" list of state program performance measurements for use in those states negotiating a Performance Partnership Agreement (PPA) with EPA for FY 1996. Montana has not entered into a PPA with the EPA but is still operating its programs under the terms of the State/EPA Agreement format. The measures listed below are a mixture of (activity/bean counting) and outcome (environmental indicators/goals) measurements. This is a work in progress and will be modified with experience.

#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
1	Compliance rates by industry sectors and by media (air, water, waste, etc.)	To measure industry compliance and effectiveness of state/EPA enforcement and compliance activities.	State role; Continue to provide facility specific compliance information through automated data systems. EPA role; Produce semi-annual analysis identifying compliance rates by sectors and media for state. Comments; No new reporting requirement for state.
2	Significant noncompliance (SNC) rates by industry sector and by media.	To measure industry noncompliance and effectiveness of state/EPA enforcement and compliance activities.	State role; Continue to provide facility specific compliance information through automated data systems. EPA role; Produce semi-annual analysis identifying SNC rates for sectors and media for state. Comments; No new reporting requirements for state.
3	Number of inspections conducted by state.	To measure use of compliance monitoring as a tool for ensuring compliance.	State role; Continue to provide facility specific data on EPA negotiated inspections through automated data systems. Also provide number of additional state inspections by media and sector. EPA role; Produce semi-annual analysis of inspections conducted by states, identifying number of inspections conducted by industry sectors and as a percentage of total universe. Comments; No new reporting for EPA negotiated inspections. <i>New reporting requirements for state inspections by industrial sectors and by media.</i>
4	Number of administrative enforcement actions, number of civil judicial, and number of criminal actions (a) initiated by each media, and (b) concluded for each media.	To measure use of enforcement actions as a tool for ensuring compliance.	State role; Continue to provide facility specific enforcement activity through automated data system for (a). Report (b) through national data system at option of state. EPA role; Produce semi-annual analysis identifying number of each type of enforcement action initiated by media and the number concluded where state does reports for state. Comments; <i>Data on concluded cases is new reporting requirement AND IS OPTIONAL.</i>

#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
5	Describe up to ten state enforcement settlements in which innovative Supplemental Environmental Projects (SEP's) or injunctive relief are utilized.	To identify innovative state enforcement settlements.	<p><u>State role</u>; Provide a narrative description of innovative settlements for FY 1996 at <u>OPTION OF STATE</u>.</p> <p><u>EPA role</u>; Share innovative examples with all states.</p> <p><u>Comment</u>; Allows states the opportunity to describe innovation and environmental benefits of selected enforcement settlements.</p>
6	Average time (for each media) needed by state either to return significant violator to compliance or to issue enforceable compliance plan (starting from identification of violation).	To measure timeliness of efforts to achieve compliance.	<p><u>State role</u>; Continue to provide facility specific data on compliance status and enforcement activity through automated data system.</p> <p><u>EPA role</u>; Produce semi-annual analysis identifying average time by media for state.</p> <p><u>Comments</u>; Does not replace existing media specific SVT&amp;A policies.</p>
7	Percent of significant violators in each media that have new or recurrent significant violations within two years of receiving a formal enforcement action.	To identify recurrent patterns of noncompliance.	<p><u>State role</u>; Continue to provide facility specific data on compliance status and enforcement activities through automated data systems.</p> <p><u>EPA role</u>; Produce annual analysis of national patterns of recurrent noncompliance.</p> <p><u>Comments</u>; No additional reporting requirements.</p>
8	Reduction in pollutant emissions, discharge loading, and improperly managed substances achieved by state through enforcement settlements-including SEP's and injunctive relief.	To demonstrate environmental benefits resulting from enforcement activities.	<p><u>State role</u>; Develop annual analysis of benefits achieved from enforcement settlements.</p> <p><u>EPA role</u>; Share result of EPA FY 1995 pilot test for federal cases. (one state is also conducting a pilot test of this measure for their cases). EPA will provide prototype data collection form and software.</p> <p><u>Comments</u>; <i>new data requirement for this measure.</i></p>



#	MEASURES	PURPOSE	ROLES & REQUIREMENTS
9	Describe state's compliance assistance program including: the types of assistance provided; the number and percent of facilities in industry sectors assisted through each type; and an evaluation of effectiveness using available data.	To evaluate effectiveness of compliance assistance as a tool for ensuring compliance.	State role; Provide a narrative description of state's compliance assistance program for FY 1996. EPA role; Share information with all states. Comments; Enhances needed national dialogue about compliance assistance methods and effectiveness.
10	Percent of facilities seeking assistance under the <u>Interim Policy on Compliance Incentives for Small Business</u> , which complied within the requisite correction period (180 days or 360 days with pollution prevention).	To measure effectiveness of compliance assistance as a tool for small business compliance.	State role; Develop annual analysis providing percentage by sector. EPA role; EPA will use state data to evaluate effectiveness of policy and determine if policy will be extended or modified. Comments; <i>Mandatory only for states using this policy</i> and adopting its correction period option.



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## SECTION 4: FEDERAL OVERSIGHT RELATIONSHIPS

Any analysis of state environmental or natural resource regulatory programs, particularly in the area of compliance and enforcement, should include a review of the relationships between those state programs and the federal government. Some of the programs included in this study are purely state initiatives without direct federal counterparts; Motor Vehicle Recycling and Disposal, Hard Rock Mining, Conservation Districts, Service Forestry, for example, and others. Many other programs, such as Air Quality, Water Quality, Solid Waste and others, are Montana's response to federal requirements to implement national initiatives set forth by Congress. The state/federal programs reviewed by the Environmental Quality Council in this study have various fiscal, oversight, and reporting relationships specifically with the U.S. Department of Interior's Office of Surface Mining (OSM) in the case of the state Coal Program, and with the Environmental Protection Agency (EPA) in the case of many of the pollution prevention programs administered by the Department of Environmental Quality.

Representatives of both agencies provided information to the EQC; Mr Eric Finke and Mr. John Wardell for the Helena Operations Office of the EPA and Mr. Guy Padgett for the Casper and Albuquerque Field offices of the OSM. Both agencies responded to a series of questions provided in advance. The written responses from these federal agencies are included here. The attachments referred to in the responses are not included in this document but are available for review at the EQC office in Helena.

### Responses to Questions by EPA Representatives

**1. Q: State "Primacy" to Administer Environmental Programs - What is it and How is it Achieved?**

**A:** "Primacy" goes by many names, depending on the environmental program. For example, "primacy" is the terminology for an EPA-approved underground injection control or drinking water (public water supply) program, "authorized" for hazardous waste and NPDES programs, and "approved program" for the underground storage tank and municipal solid waste programs. Since Federal statutes and regulations use these terms specifically, "delegation" is the term this Response to Questions will use for generic reference to EPA approval of a state program.

The terminology for a delegated state program, as well as the showing that states must make to EPA in order to achieve it, are taken from the relevant statute. The procedural aspects of program approval are contained in EPA rules. The criteria that EPA uses to determine if the showing required by statute has been adequately been made are contained in EPA rules and/or guidance. Please refer to Table 1 for an illustration of the various terminologies for program approval, and other relevant information which helps explain the subtle differences between program approval in the different programs. For comparison purposes, Table 1 provides a description of the delegation standard from the relevant statute that a state must meet to receive delegation of an EPA program. Although this is not the only criteria that a state must meet, it is provided to illustrate the most significant condition that determines how flexible or tolerant EPA may be in accepting a state program that differs from the Federal program.

Delegation places the primary implementation of the delegable programs into the hands of the states. The delegation process also helps to achieve the extent of national uniformity in environmental protection sought by the statute. Although EPA retains authority to enforce or implement some aspects of delegated programs on a case-by-case basis, it removes the prospect of routine, duplicate (and perhaps contradictory) implementation by EPA and the states. In some cases, it is also a qualifying factor in a state's ability to receive Federal grants for environmental programs.

Not all programs are delegable to states by EPA. For example, the statutes for programs such as Superfund (CERCLA), PCBs under TSCA, the Oil Pollution Act (OPA), and EPCRA do not contain the language allowing EPA to delegate them to states; and the CWA gives primary implementation authority for the Dredge and Fill program to the US Army Corps of Engineers.

In general, seeking delegation is at the option of the state. In some cases, such as the Municipal Solid Waste program under RCRA Subtitle D, and State Implementation Plan (SIP) and Operating Permit programs under the Clean Air Act, the statute mandates that states develop certain aspects of the program and submit them to EPA for review and approval. As a condition of delegation, states must also update or revise their delegated program to keep up with changes made in the Federal program. For example, as new hazardous waste regulations are promulgated by EPA, an authorized state must develop companion regulations that are approvable, and submit to EPA an application to revise its authorization.

The process for achieving delegation is similar among environmental programs: States submit applications for program approval to EPA; EPA reviews the application and makes a tentative determination; EPA submits the application and its tentative determination to the public for review and comment; and EPA makes a final determination based upon the public comment it receives. The applications themselves also have similar components: a Governor's letter transmitting the application and requesting delegation; a certification by the state's Attorney General that the state has the requisite authority to carry out the program; a copy of all relevant state statutes and regulations; and a narrative description of the state's program.

As part of the delegation, the state must enter into a Memorandum of Agreement (delegation MOA) with EPA that defines the respective roles of the two agencies after delegation, provides for the sharing of information, and describes the process for transition of primary implementation responsibility from EPA to the state. And, if the Federal program has an enforcement component, the state must also enter into a Cooperative Enforcement Agreement with EPA. This agreement is described later in this response.

If a recurring Federal grant is available for the program, the state and EPA also develop annual program work plans, which serve as a joint program planning document, and become part of the state's grant applications. In Montana, these work plans are consolidated into a single document referred to as the Montana State/EPA Agreement (SEA). The Montana SEA describes the programmatic activities that the State will carry out in each environmental program area during the year as conditions of the grant awards. It also describes the activities that EPA will carry out in support of and oversight of the State's activities. The SEA is made available for public review and comment. The FY 96 Montana SEA is attached (Attachment 1).

For the committee's reference, Table 2 summarizes the status and extent of program delegation in Montana.

**1a. Q: Are there different processes to achieve primacy for different programs?**

**A:** The processes to achieve delegation of environmental programs are largely the same, in terms of what delegation applications should contain, and the public process EPA must follow in reviewing and approving or disapproving the applications. The processes of application and review are published by EPA as rulemaking in the Federal Register. Table 1 includes the relevant citations to Federal rule for each program. This process is described in the response to Question 1 above.

However, there are several exceptions to this general process. Regarding the approval of State implementation Plans (SIPs), states submit plans for attainment and maintenance of air quality, rather than an application for delegation. For the pesticides program, states submit Certification and Training Plans for EPA approval. Although these are considered plans rather than applications, many of the same components, such as relevant state statutes and regulations, must be included. Finally, the delegating instrument for pesticides enforcement primacy is the Cooperative Enforcement Agreement.

**1b. Q: What is the typical timeframe to achieve primacy? Why do some programs take several years (or longer) to achieve primacy?**

**A:** It is not possible to state a "typical" timeframe to achieve primacy. The timeframes to achieve primacy are comprised of the time necessary for: (1) a state to promulgate its own statutes and regulations; (2) a state to prepare and submit an application; (3) EPA to review the application and publish a tentative approval notice in the Federal Register; (4) the public to review and comment on the application; and (5) EPA to respond to public comments and prepare a final notice approving the application.

The actual time necessary to complete these steps depends on many factors, including how many resources the state and EPA are able to devote to the delegation process; how complete the state's application is; how well the state's application meets EPA's criteria for delegation (including the degree to which EPA may be flexible in accepting state programs which do not mirror EPA's); whether state statutory or regulatory changes are necessary to meet the criteria; the extent to which the application presents unique legal or implementation concerns; the degree to which the components of the application are highly technical (compared to administrative); the nature of public comment if the delegation is controversial; and others.

The timeframes for EPA to review and approve applications (steps 3 through 5 above) are set out in the relevant statute and/or Code of Federal Register (CFR) (see citations in Table 1), and vary from program to program. Following are a few examples of the statutory or regulatory timeframes for the period from receipt of a complete application to final approval by EPA:

- SIP approval: 1 year

- NPDES authorization: 90 days
- MSW program approval: 180 days
- PWSS primacy: 90 days
- UST program approval: 180 days

**1c. Q: What is the EPA attitude toward primacy? (Does EPA want states to have primacy?)**

**A:** EPA encourages states to seek delegation of delegable environmental programs. (Note that not all environmental programs are delegable by EPA. Some programs like Superfund, PCBs under the Toxic Substances Control Act, and the Emergency Planning and Community Right to Know Act (EPCRA) programs are not delegable. See Table 2 for the complete status of program delegation in Montana.)

**1d. Q: During the 1995 session, a bill (HB 440) was introduced to give environmental enforcement responsibility back to EPA. The fiscal note attached to the bill stated that this would save the State of Montana General Fund \$532,543 over the 96-97 biennium. Please comment on the relative cost of federal vs. state implementation of environmental programs. Could EPA handle implementation of Montana's programs? What would be a realistic prediction of the effect of such a change on the condition of Montana's environment? Are there any states that have pursued similar options?**

**A:** EPA has not compiled relative costs of federal vs. state implementation of environmental programs. Although EPA is not anxious for states to turn delegated programs back to EPA, EPA would implement them, if necessary. Such a program might be a minimal one, with EPA enforcement as the primary means of doing so. It is not possible to predict what impact this might have on the condition of Montana's environment.

**2. Q: So a Program Achieves Primacy... Then What?**

**A:** When a program is delegated, the responsibility for direct implementation of the delegated aspects of the program transfer from EPA to the delegated state. Subject to the terms of the delegation MOA, EPA's role becomes one of providing support to the delegated state, and overseeing the state's performance. In all delegations, however, EPA retains the authority to implement aspects of the program on a case-by-case basis. For example, in assuming the implementer role for the NPDES program, the delegated state inspects sources for compliance with state requirements, reviews permit applications, issues permits, enforces against non-compliance, maintains the Permit/Compliance System (PCS) data base, and is the interface with the regulated community and the public for the NPDES program. EPA provides technical support, training, interprets Federal regulations if necessary, assists the state in overcoming programmatic obstacles where they might exist, and oversees the state's performance via the program grant work plan (SEA) and the Enforcement Agreement.

Real or apparent overlapping implementation between EPA and the delegated state may occur where (1) EPA has issued permits in the state prior to delegation, and by agreement with the state in the MOA, the EPA permits will not be immediately terminated; (2) EPA has promulgated new



regulations that are effective in the state, but the state has not yet adopted the new regulations, or delegation for these new regulations have not yet taken place; (3) or, by agreement with the state in the MOA, EPA maintains a co-implementer role for a temporary period as part of the transition of the program to the state (this would be rare).

As part of its oversight role after delegation, EPA oversees both permitting (where applicable) and enforcement as the primary program activities, and others that may also be applicable (such as pesticide applicator certification and training). The delegation MOA, for example, will specify which permit applications EPA will routinely review (e.g., major vs. minor wastewater discharge facilities), and the Enforcement Agreement (EA) will specify how EPA will oversee enforcement.

The EA delineates the enforcement responsibilities of both the delegated state and EPA. It also specifies the conditions under which EPA may exercise its own enforcement authority. The EA is the principal standard by which EPA evaluates the state's enforcement program. The terms of the EA are built from the terms of EPA enforcement policies. Both specify which violations are normally considered major or minor (other terminology may be used), what type of enforcement action (formal or informal) is normally appropriate, what is normally an acceptable time period between discovery of a violation and the taking of the appropriate action to return the violator to compliance, and when seeking a penalty is normally appropriate. The terms of "normal" timeliness and appropriateness may be adjusted by mutual agreement to suit the circumstances of each individual case. Copies of current Montana/EPA Cooperative Enforcement Agreements are attached (Attachments 2 through 6).

EPA encourages states to develop their own penalty policies. Most often, EPA penalty policies are used as the starting point, and state penalty policies frequently mirror those of EPA. Where a state penalty policy exists, EPA prefers to use the state policy when evaluating the appropriateness of state penalties, unless there are substantial differences between the EPA and state policies; otherwise, EPA will use its own penalty policy as an evaluation criteria.

**2a. Q: What is the type and level of EPA involvement once a program achieves primacy? Does this vary by program? How is the level of federal monitoring and/or directing determined for programs with primacy? What about programs without primacy?**

**A:** EPA's involvement after program delegation is described above. Where programs are not (or not yet) delegated, EPA retains full authority and responsibility for implementation. However, dependent upon the status of the state's own statutory and regulatory authority and programmatic capability, EPA may enter into an agreement with states to implement some or all aspects of the program for EPA when it is known that the state intends to seek delegation.

**2b. Q: What are the "triggers" for EPA entry into an enforcement action? How does "overfiling" work? Is such entry predictable from the perspective of the regulated community? How do politics and/or publicity affect whether and when EPA will step in?**

**A:** There are several ways in which EPA might become involved in an enforcement action in a delegated state: (1) the violation may be a Federal-only violation which could only be enforced by EPA (for example, use of an improper pesticide label); (2) the state could request EPA to

participate in a joint action; (3) the state could refer the case to EPA; (4) EPA could determine that the case is nationally significant, and request that the state turn the case over to EPA; (5) in its oversight capacity, EPA could determine that the state did not meet the timely and appropriateness criteria in the Enforcement Agreement (EA). The terms for EPA involvement in an enforcement action in a delegated state are contained in the EA.

"Overfiling" is the filing of an enforcement action by EPA when EPA has determined that a state's action has not met the timeliness and appropriateness criteria of the EA. In some cases, the delegated state has already taken or initiated an enforcement action of its own. In others, no state action has yet been filed. Where a state has already filed or will imminently file its own action, EPA prefers not to duplicate the terms of state's action, but would instead seek relief not sought by the state, such as additional injunctive relief, or greater penalty.

Although politics or publicity may make one case appear more glamorous than another, EPA relies solely on the terms of the Enforcement Agreement and the five "triggers" described above in determining when and if EPA enforcement action is necessary or warranted.

**2c. Q: Testimony was received that EPA is "getting out" of some programs; which programs does this apply to, how, and why? What happens when EPA is "out"?**

**A:** Specifically, this statement applied to the Underground Storage Tank (UST) program. The Director of EPA's Office of Underground Storage Tanks (OUST) has indicated that EPA plans to phase out its involvement in this program over a period of several years. This phase out follows naturally from the original concept of EPA's role in the UST program. EPA designed the Federal UST program as a "franchise", where EPA's only role would be one of state capacity-building, rather than as a Federal implementer. EPA intended that it's role would be minimal after state programs were approved. Although it is not possible to predict precisely what "getting out" would mean, some of the components of doing so could include downsizing EPA's UST office, reducing grant funds, providing less oversight and technical assistance, etc. EPA intends that states would ultimately operate approved UST programs with little or no EPA involvement.

**2d. Q: Do you feel that state programs use the "threat" of EPA action as a tool for compliance (e.g., the "gorilla in the closet")? Please comment on your perspective of this aspect of the federal/state enforcement relationships.**

**A:** EPA is aware that state enforcement programs occasionally make recalcitrant violators aware of the fact that EPA retains the discretion to take its own enforcement action on a case-by-case basis. EPA has committed to provide support to all aspects of state environmental programs, including enforcement, and does not object to states doing so.

**3. Q: How is the State/Federal Relationship Working in Montana? What's Used to Measure State Program Success? (by program?)**

**A:** Historically, EPA has evaluated state programs in two ways: (1) performance under the SEA work plan; and (2) performance under the Enforcement Agreement (EA). The program-

specific work plans and EAs are used for this evaluation. These are by no means the sole criteria by which "success" would be measured. Many other measures, such as trends in environmental conditions, resources available to the state program, and size and makeup of the regulated universe are also relevant considerations. EPA has relied on these two measures because they are negotiated agreements, and are measurable over a reasonable time period. EPA and the states are currently developing longer term measures which may replace or augment these two measures in the future.

EPA reviews state performance under the SEA work plan. At mid-year, EPA reviews the status of accomplishment of SEA milestones, with emphasis on obstacles encountered, problem solving, and mid-course adjustment of goals, if necessary. It is a review conducted principally among senior managers within EPA and the state. The year-end SEA evaluation is a more detailed assessment of achievement of the specific milestones in the SEA, and also serves to satisfy EPA grant requirements for an annual grant work plan review.

The timing and form of review of state enforcement performance is more program specific. In all cases, however, the program-specific EA is the evaluation standard used, with allowances made for case-specific circumstances. For example, the RCRA hazardous waste program performs a formal assessment of compliance monitoring and enforcement as part of the year-end SEA review. During this review, EPA assesses the timeliness and appropriateness of enforcement actions, and appropriateness of penalties assessed and collected. With state participation, Region VIII EPA developed a standard procedure for this review (see *Policy, Guidance, and Standard Operating Procedures for Oversight of Hazardous Waste Compliance Monitoring and Enforcement Programs, November 1993*) (Attachment 7).

Other EPA programs, such as Air and the water programs (PWSS and NPDES) review enforcement performance more frequently. EPA representatives from these programs meet with state representatives monthly to review the status of existing and developing cases, including the timeliness and appropriateness of enforcement actions, and appropriateness of penalties assessed and collected.

As a result of its history of exceptional performance among state pesticide programs, EPA Region VIII designated Montana's pesticide program as a participant in Region VIII's minimal oversight pilot program. EPA Region VIII presently conducts minimal conventional oversight of Montana's pesticide program. Oversight is generally limited to review of quarterly enforcement reports submitted to EPA as part of SEA requirements, and mid-year and year-end SEA reviews.

Finally, the EPA Municipal Solid Waste (MSW) program conducts little oversight of the state program. No program grant funds are available to states, and at the Federal level only citizen suit enforcement is permitted under RCRA Subtitle D, unless EPA disapproves a state program. Although there is discussion of the MSW program during mid-year reviews, the FY 96 SEA contains no MSW program work plan, and there is no EA for the MSW program.

**3a. Q: Which Montana programs have achieved primacy? Which have not, and why?**

**A:** Table 2 describes the status and extent of program delegation in Montana. Although it is in

most cases the state's option to decide to seek delegation (see the Question 1 response above for exceptions), Montana has applied for delegation of all delegable EPA programs, except for the Class I, III, IV, and V wells of the UIC program.

- 3b. Q: What does EPA use to measure success? (Are the newly proposed evaluation criteria provided for the January Subcommittee meeting now in use?) Based upon these criteria, what kind of report card can Montana claim?**

**A:** The response to Question 3 describes the criteria EPA uses to measure program "success". These criteria are contained in the State/EPA Agreement (SEA) work plans, and the Cooperative Enforcement Agreements (EAs). In Montana, the newly proposed criteria are not yet in effect. The new criteria referred to by this question are criteria designed to be used as part of the National Environmental Performance Partnership System (NEPPS) described in response to Question 5 below.

Based on the criteria contained in the Montana SEA and EA, EPA believes that Montana implements a set of effective environmental programs.

- 3c. Q: How would you characterize the EPA relationship with the regulated community in Montana? How would you characterize your relationship to the public interested in environmental protection in Montana?**

**A:** EPA Region VIII and the EPA Montana Office strive to maintain a fair, impartial, and professional relationship with the regulated community in Montana. EPA employees are also public servants, and as such strive to maintain an open exchange of information with the public they serve.

- 4. Q: The Montana Experience vs. Other Nearby States**

**A:** Region VIII-wide, the criteria used through FY 95 to evaluate state program and enforcement performance are similar to those used for Montana. Although SEAs are state-specific, they are all based on national EPA program guidance, adjusted to accommodate regional and state priorities. EAs are also based on national EPA enforcement policies and guidance. Although they may be less state-specific than SEA work plans, adjustments are still made to accommodate the particular nuances of some state enforcement processes.

- 4a. Q: Based on the information provided under the preceding topics, how does the treatment of Montana compare to the treatment of other, nearby states? How does the EPA report card for Montana compare with those for other, nearby states?**

**A:** It is EPA's policy to evaluate all state programs on a similar basis. As stated previously, EPA relies on criteria contained in the SEA work plans and Enforcement Agreements in doing so.

For the Subcommittee's information, Table \_\_ compares the status of program delegation among the six states in Region VIII (CO, MT, UT, ND, SD, WY), and Table \_\_ compares the level of EPA enforcement action in all six Region VIII states over the last three years.

**5. Q: Options for Improvement**

**A:** Recently, EPA has implemented or piloted a number of programmatic and enforcement policies that might also benefit the State of Montana now or in the future. Among these are:

- (1) the National Environmental Performance Partnership System (NEPPS);
- (2) the Regulatory Reinvention Pilot Projects (Project XL);
- (3) the use of Supplemental Environmental Projects in enforcement actions;
- (4) a Small Community compliance policy;
- (5) a Small Business compliance policy;
- (6) an Environmental Audit policy; and
- (7) the use of the BEN model to estimate the economic benefit of non-compliance, and the use of the ABEL model to help evaluate a violator's ability to finance pollution-related expenditures.

A copy of a more detailed explanation of each of these is attached to this response (Attachments 8 through 15).

The *National Environmental Performance Partnership System* (NEPPS) project represents EPA's desire to place greater responsibility and accountability for planning and implementing environmental programs into state hands, with less traditional oversight and evaluation by EPA. Some states, like Colorado, have already embarked on this project. EPA anticipates other states will begin working with EPA on this basis during FY 97. The key components are:

- Increased use of environmental indicators - greater use of results-based national and local environmental conditions, rather than bean counts, to measure long-term program effectiveness;
- A new approach to program assessments by states - greater reliance on state self-assessments and sharing of information about environmental conditions and goals with the public;
- Environmental Performance Agreements - a 2-year joint environmental performance agreement;
- Differential oversight - Lesser Federal oversight on state programs that perform well, and program-wide, limited after-the-fact reviews, rather than case-by-case intervention;

- Performance Leadership programs - national recognition and minimum oversight for states that achieve Performance Leadership status based on their Environmental Performance Agreement;
- Public outreach and involvement - sharing with the public the state of environmental conditions, goal- and priority-setting, alternative approaches to environmental protection, and evaluation of this new approach to joint state/EPA environmental management;
- joint system evaluation - the success of this approach will be judged by its effectiveness, public credibility, fiscal soundness, and program accountability.

*Project XL* is being implemented by EPA on a pilot basis. Announced in May 1995, Project XL gives a limited number of regulated sources the flexibility to develop alternative strategies that will replace or modify specific regulatory requirements on the condition that they produce greater environmental benefits. EPA anticipates that 50 projects will eventually be selected in four areas - facility-specific, industry-wide, government agencies, and communities.

*Supplemental Environmental Projects (SEPs)* are environmentally beneficial projects that a violator agrees to undertake, but which the violator is not otherwise legally required to perform. The SEP often brings about environmental and public health benefits that a pure penalty action would not achieve, such as pollution prevention, additional pollution reduction, public education, or environmental justice. The SEP becomes part of the enforcement settlement, and EPA considers the violator's willingness to perform an SEP when determining an appropriate and fair penalty amount. Using computer software known as PROJECT, EPA determines the after-tax cost of the SEP based on the violator's estimated cost of performing the SEP.

EPA's *Policy on Flexible State Enforcement Response to Small Community Violations* (Small Community Policy) states that EPA will accept a flexible state enforcement response to violations by small communities (fewer than 2500 residents). This flexibility assures states that EPA will not overfile, and promotes alternative strategies for small communities to meet environmental and economic goals. In order to qualify for treatment under this policy, states must establish a process to provide compliance assistance, screen communities for participation, assess good faith, establish risk-based priorities among violations, and ensure prompt correction of violations. The policy does not apply to criminal violations.

The *Policy on Compliance Incentives and Penalty Waivers for Small Businesses* applies to businesses of 100 or fewer individuals on a company-wide basis. Under this policy, EPA will eliminate the entire civil penalty if all qualifying criteria are met, will eliminate the entire gravity component of the penalty if all but the fifth criteria are met, or will mitigate the penalty to the maximum extent possible if the business has made a good faith effort to comply. The criteria are: (1) the business must have sought compliance assistance from a non-confidential government or government-supported program, and the violations must be detected during that assistance; (2) this is the business's first violation of the requirement; (3) the violation must not have resulted in actual harm to public health, safety, or environment; (4) the violation does not involve criminal conduct; and (5) the business corrects the violation in 90 days, or enters into an enforceable agreement to

correct the violations if a longer period is necessary.

EPA's *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations* policy, otherwise known as the environmental audit policy, provides incentives for regulated entities of all kinds to voluntarily discover and correct its own violations. Under this policy, EPA will (1) waive 100% of the gravity component of the penalty where the violation was discovered via an environmental audit or "due diligence", or 75% of the gravity component where the violation was found via any voluntary means; (2) not recommend for criminal prosecution a violation so discovered; and (3) not request audit reports to initiate civil or criminal investigations. There are 9 conditions that the regulated entity must meet to qualify for treatment under this policy. They include: discovering the violation(s) during a systematic, objective, and periodic environmental audit, or other documented procedure reflecting due diligence, and not through a monitoring, sampling, or audit procedure already required of the regulated entity; disclosing the violation in 10 days; correcting the violation in 60 days; discovery must be prior to the imminent discovery by a regulatory agency, third party, or "whistleblower"; the violation must not have resulted in actual, serious harm; and the violation must not have occurred previously within the last 3 years, or be part of a pattern of violation's by the facility's parent organization within the last 5 years. EPA is aware that Montana is developing a similar policy.

The *BEN Model* is used by EPA to compute economic benefit that a violator may have realized as a result of noncompliance. EPA strongly believes that recovery of economic benefit at a minimum as part of a penalty assessment is critical to maintaining a strong incentive for compliance. The use of the BEN model standardizes the computation of economic benefit, so that each violator that experiences economic benefit is treated similarly and reasonably. The recovery of economic benefit levels the playing field among regulated entities. The *ABEL Model* assists EPA in evaluating a firm's ability to finance penalties, cleanups, and pollution control expenditures.

**5a. Q: Do EPA staff have any suggestions for improvements? Are there "success stories" from other states that might address topics addressed by the Subcommittee?**

**A:** EPA has piloted or adopted a variety of new programs and policies to adapt its own programs to changing needs. Montana may want to consider the appropriateness of adopting some or all of them (see response to Questions 5 above).

**EPA representatives have also been requested to respond where possible to comments made by a participant at the March 20-21 Subcommittee meeting, as follows:**

**Comment: [paraphrased here due to its length]**

EPA is a "shadow at the table" of state enforcement. The permittee never knows for sure whether EPA will be satisfied.

The commenter also noted the use of the BEN model is ineffective and inconsistent. He noted an enforcement action against nitrate discharges into Libby Creek, where other dischargers were

emitting much higher levels with no requirement to monitor, like the highway project with significant blasting with no oversight at all. Libby Creek flows into the Kootenai River which flows into Canada. Canada puts nitrate into the river as a nutrient. He suggested the State use BEN with discretion.

He suggested the Subcommittee be slow in recommending changes to the water quality program's new compliance manual before seeing if it works.

**Response:**

In response to the first comment regarding EPA as a "shadow at the table" of State enforcement, EPA believes it makes clear what its enforcement expectations are in both the Enforcement Agreement and periodic enforcement case review meetings with the State enforcement agencies.

In the second comment, the commenter appears to confuse the use of the BEN model with both State or Federal policy determinations of what activities are to be regulated, and with equitable enforcement of the requirements placed on those activities. The BEN model is strictly a tool to determine the amount of economic benefit a violator might have realized as a result of his/her non-compliance. It does not help decide when to take an enforcement action, nor does it determine whether State or Federal environmental standards are equitable in terms of unregulated activities. These are discretionary and policy decisions made in other formats and contexts broader than a single alleged violation. The activities of a foreign government certainly play no part in determining economic benefit via the BEN model.

Finally, EPA applauds the Water Quality Division for development of its new compliance manual, and agrees that the Division should have the opportunity to gain more experience under the new manual before making significant changes.



Table 1. Selected Information Regarding Delegation of EPA Environmental Programs

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce Federal or State requirements?	Recurring Federal grant available?/ Minimum required State share	Is grant contingent upon delegation?
Air	Various dates from 1972 to present	State Implementation Plans: Approved SIP	SIP must provide for attainment of National Ambient Air Quality Standards as expeditiously as practicable.	40 CFR Part 51 & 52 CAA 110	State regulations and permit provisions	Yes/NOE1+33%	No, grants are also available for program development
	1980	New Source Review: Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1977	New Source Performance Standards (NSPS): Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1983	Prevention of Significant Deterioration (PSD): Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1977	Asbestos NESIIAP: Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1995	Operating Permits: Approved (currently interim approval)	State requirements must be at least as stringent as Federal	40 CFR Part 70 CAA 502(d)	Same, but not "state-only" requirements	Program is funded by state permit fees	Not applicable
	1995	Air Toxics: Approved (permit mechanism only)	State regulations must be at least as stringent as Federal	CAA 112(l)	State regulations and permit requirements	Same as above (funded by both grants and fees)	No, grants are also available for program development

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR <sup>1</sup> and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce Federal or State requirements?	Recurring Federal grant available?/ Minimum required State share	Is grant contingent upon delegation?
	1995	Acid Rain: Approval	State regulations must be consistent with Federal	Not applicable - implemented via operating permits	State regulations and permit requirements	Not applicable, part of operating permit program	Not applicable
Hazardous Waste (RCRA Subtitle C)	1984	Authorized	State program must be equivalent to Federal, and consistent with Federal and other State programs	40 CFR Part 271 RCRA 3006(b)	After authorization but prior to codification, Federal regulations; after codification, State regulations and permit requirements	Yes/25%	No, grants are also available for program development
Municipal Solid Waste (RCRA Subtitle D)	1993	Approved program	State program must be adequate to ensure compliance with Subtitle D MSWLF <sup>3</sup> criteria	40 CFR Part 239 (proposed) RCRA 4005(c) and 4007	Neither after approval (enforcement of Federal requirements is limited to citizen suit); Federal regulations after disapproval	No <sup>4</sup>	Not applicable
Wastewater Discharge Permitting (NPDES)	1978	Authorized	State program must apply, and insure compliance with, the requirements of CWA sections 301, 302, 306, 307, and 403	40 CFR Part 123 CWA 402(b)	State permit requirements, or Federal regulations where no permit was issued	Yes/MOE <sup>5</sup>	No, grants are also available for program development
Pesticides (FIFRA)	1976	Certification: Approved Plan Enforcement: Primacy <sup>7</sup>	State certification standards must conform with Federal State must have adopted adequate pesticide use laws and regulations	40 CFR Part 171 FIFRA 11 FIFRA 26	Not Applicable Federal regulations	Yes/50% Yes/15%	No, grants are also available to develop certification programs
Public Water Supply Supervision (PWSS)	1978	Primacy <sup>7</sup>	State regulations must be at least as stringent as Federal	40 CFR Part 142 SDWA 1413	Federal regulations	Yes/25%	First grant is contingent upon applying for primacy, continued eligibility is contingent upon establishing and maintaining primacy

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR <sup>1</sup> and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce Federal or State requirements?	Recurring Federal grant available?/ Minimum required State share	Is grant contingent upon delegation?
Underground Injection Control, Class II (UIC)	Probable 1996, to Oil and Gas Conservation Commission	Primacy <sup>7</sup>	State program must represent an effective program to prevent injection which endangers drinking water sources	Guidance <sup>4</sup> SDWA 1425	State permit requirements, or state regulations where no permit had been issued	Yes/25%	First grant is contingent upon applying for primacy, continued eligibility is contingent upon establishing and maintaining primacy
Underground Storage Tanks (UST, RCRA Subtitle I)	1996	Approved program	State requirements must be no less stringent than Federal	40 CFR Part 281 RCRA 9004	State requirements	Yes/25%	No, grants are also available for program development

**Footnotes:**

- <sup>1</sup> CFR = Code of Federal Regulations
- <sup>2</sup> MOE = Maintenance of Effort. Section 105 of the Clean Air Act requires states to commit to their air programs at least the same dollar amount of funds that were committed in the previous fiscal year.
- <sup>3</sup> MSWLF = Municipal Solid Waste Landfill
- <sup>4</sup> Although recurring program grants are not available for the Municipal Solid Waste program, EPA has provided some one-time grants in MDEQ for recycling and solid waste promotion and education.
- <sup>5</sup> CWA section 106 grants provide funding for a variety of Clean Water Act-related activities, of which the NPDES program is one.
- <sup>6</sup> MOE = Maintenance of Effort. Section 106 of the Clean Water Act requires states to maintain in subsequent years the level of funding committed by the State the first year after it received NPDES program delegation.
- <sup>7</sup> Primacy = Primary Enforcement Responsibility
- <sup>8</sup> No procedural rule was published regarding granting of primacy for UIC Class II wells. Instead, EPA issued guidance for this class of wells. See 50 FR 27334, published May 19, 1991.

Table 2. Status and Extent of Program Delegation in Montana

<u>Program</u>	<u>Status and Extent of Delegation</u>	<u>Delegated Agency</u>
NPDES	Completely authorized except for pretreatment and sludge.	MDEQ
CWA 404	Not delegable.	
PWSS	MT has primacy.	MDEQ
UIC Class II	MT has applied for primacy, and approval is expected imminently.	MDEQ
UIC Classes I, III, IV, V	Primacy not applied for.	
CERCLA	Not a delegable program, but MT participates with EPA via cooperative agreements.	
RCRA Subtitle C	Authorized for "base program", plus all regulatory changes up through July 1, 1989 (Non-HSWA Cluster IV). MT has applied for authorization of additional program elements such as Land Disposal Restrictions, Corrective Action, and Burners/Industrial Furnaces, and authorization is anticipated in the near future.	MDEQ
RCRA Subtitle D (MSWLFs)	Approved for Part 258, Municipal Solid Waste Landfills.	MDEQ
RCRA Subtitle I (UST)	Approved.	MDEQ
Air	See Table 2a., following.	MDEQ
FIFRA	Certification and training plan approved. Primacy granted for enforcement. MT also implements worker protection, ground water protection, and endangered species programs under FIFRA.	MDA

TSCA	MT has an EPA-approved certification and accreditation program under the Asbestos Hazard and Emergency Response Act (AHERA) for the asbestos-in-schools program. No other aspects of TSCA are delegable.	MDEQ
EPCRA	Not a delegable program. EPCRA 311 and 312 reports of stored hazardous materials are submitted to state and local emergency planning committees by industry. EPCRA 313 reports of releases to the environment are reported by industry to EPA.	
OPA	Not a delegable program.	

Table 2a. Montana Air Program Delegation Detail

<u>Provision</u>	<u>Status of Approval</u>
Prevention of Significant Deterioration	Approved as part of SIP, except for 6 permits issued by EPA
New Source Review	Approved as part of SIP
Asbestos	Approved as part of SIP
Ozone Protection (CFCs)	Approval not applied for
Acid Rain	Approved
Operating Permits	Interim approval granted
New Source Performance Standards	All NSPS state regulations approved in State Implementation Plan except Subpart UUU Calciners and Dryers in Mineral Industries
National Emission Standards for Hazardous Air Pollutants	Approved provisions: General provisions Beryllium Be Rocket Motor Firing Mercury Vinyl Chloride Equipment Leaks of Benzene Benzene from Coke By-product Recovery Asbestos Inorganic Arsenic from Glass plants Inorg As from Primary Copper Smelters Inorg As from AsO <sub>3</sub> and As Production Equipment leaks Benzene from Benzene Storage Vessels Benzene from Benzene Transfer Ops Benzene Waste Operations
Air Toxics	Partially approved

Table 3.

Comparison of Delegation Status<sup>1</sup> Among Region VIII States

Program	Current Delegation Status <sup>2</sup>					
	CO	UT	MT	WY	ND	SD
Air: SIP	D	D	D	D	D	D
New Source Review	D	D	D	D	D	D
NSPS	D	D	D	D	D	D
PSD	D	D	D	D	D	D
NESHAPS	D	D	D		D	
Operating Permits	D	D	D	D	D	D
Air Toxics <sup>5</sup>	D				D	
Acid Rain	D	D	D		D	D
Ozone Protection (CFCs)						
Hazardous Waste	D	D	D	D	D	D
Municipal Solid Waste	D	D	D	D	D	D
Wastewater Discharge (NPDES)	D	D	D	D	D	D
Pesticides	D <sup>3</sup>	D	D	D <sup>4</sup>	D	D
Public Water Supply (PWSS)	D	D	D		D	D
UIC Class II	D	D	A	D	D	D
UIC Classes I, III, IV, and V		D		D	D	
Underground Storage Tanks		D	D		D	D

## Footnotes:

1 Includes delegable programs only.

2 D = Program is delegated to state (either partial, conditional, interim, or final).  
 A = Delegation expected imminently.  
 Blank = Not delegated.

3 CO has enforcement primacy and certification plan approval for commercial applicators only.

4 WY has an approved certification plan, but does not have enforcement primacy.

5 D indicates adoption of most or all of the current 16 EPA MACT standards. Blank indicates adoption of few or none.

Table 4.

Level of EPA Enforcement<sup>1</sup> in Region VIII States  
October 1, 1993 Through January 18, 1996  
By Program

State	Number of Formal Enforcement Actions Taken <sup>2</sup>							Total
	Air <sup>3</sup>	NPDES	Pesticides	Haz Waste	UST	PWSS	UIC	
CO	7	8	21	5	19	116 <sup>5</sup>	2	177
UT	1	1	3	0	2	4	2	13
MT	12	6	1	0	10	4	19 <sup>4</sup>	52
WY	2	9	8	13 <sup>4</sup>	48 <sup>4</sup>	98 <sup>4</sup>	0	177
ND	0	4	10	1	10	0	0	25
SD	0	14	4	1	22	4	0	45

## Footnotes:

- 1 Readers are cautioned that the level of EPA enforcement in a delegated state is not an indicator of the quality or effectiveness of a state enforcement program. There are many events that could trigger EPA enforcement in a delegated state. See EPA's narrative response to Question 2b for a discussion of possible triggers for EPA enforcement in a delegated state.
- 2 Includes Notices of Violation (PWSS and UIC), administrative enforcement actions, civil complaints, and cases filed by US Department of Justice for EPA. Excludes non-delegable programs (EPCRA, CERCLA, OPA, TSCA, and CWA Dredge and Fill). Data taken from EPA Region VIII Enforcement Docket System. No record is kept in this system as to the "trigger" for EPA enforcement (e.g., referral to EPA by state, EPA overfile, joint EPA/state action, etc.)
- 3 Includes CFC enforcement cases for which no states are delegated. The Enforcement Docket System does not allow segregation of these cases from other types of Air Program enforcement actions.
- 4 Throughout most or all of this period, the state had not been delegated this program, and these numbers represent enforcement action taken by EPA in the implementer role.
- 5 This number represents cases referred to EPA by the State.



RESPONSE BY  
UNITED STATES DEPARTMENT OF INTERIOR  
OFFICE OF SURFACE MINING

**1. State "Primacy" to administer environmental programs---What is it and how is it achieved?**

Response: Primacy under the Surface Mining Control and Reclamation Act of 1977 (SMCR: P.L. 95-87) allows states to permit, inspect, and enforce coal mining reclamation activities using state laws and regulations.

Montana obtained primacy by adopting laws and regulations which were no less effective than the federal counterparts in achieving reclamation objectives for surface coal mining activities. These state laws and regulation, commonly referred to as the "State Program", were submitted to and approved by the Secretary of Interior. The Montana State Program was approved and Montana granted primacy in February of 1982.

The process for approving a State Program under SMCRA is described in 30 CFR Part 732 (copy included.) The federal approval of Montana's program is published in 30 CFR 926 (copy included).

**2. So a program achieves primacy...then what?**

Response: Once a state has obtained primacy, the state becomes responsible for the permitting, inspection and enforcement of the state laws and regulations governing permitting and reclamation activities for surface coal mining. The state may at its choice, regulate coal mines located upon Federal lands. The federal Agency, the Office of Surface Mining (OSM), provides funding and technical assistance and monitors the state's performance by conducting evaluations, periodic inspections and program reviews.

OSM's periodic review or "oversight", evaluated the effectiveness of the State Program in achieving reclamation objectives. In addition, oversight evaluates the state's performance in complying to it's approved program. Oversight results are summarized in Annual Reports (the annual Report for Montana for 1994 is included as an attachment.)

In addition to oversight and technical and financial support, OSM may exercise its "backup" enforcement powers should the state fail to take appropriate enforcement actions under the State Program.

OSM may periodically require the state to develop rules and regulations or "update" its program such that it remains no less effective than the federal counterpart. Finally, OSM may initiate actions to retract approval of all or part of an approved program.

**3. How is the State\Federal relationship working in Montana? What is used to measure program success?**

Response: The State of Montana and OSM have a cordial and professional working

relationship. Reclamation of mined areas is effective and prompt, the industry has consistently demonstrated a high level of compliance with State law, and oversight rarely reveals weaknesses or problems associated with the State Regulatory Authority. When problems are identified, the State and OSM generally work together on the Bureau level to achieve resolution; on rare occasions, where issues cannot be resolved on the local level, they have been elevated to the Governor\Secretarial level.

**4. The Montana experience vs. other (nearby) States.**

Response: The Casper field office and the Albuquerque Field Office administer grants and conduct oversight in the states of Wyoming, North Dakota, Montana, and New Mexico. These States all conduct excellent programs.

**5. Options for improvement.**

Response: The State and the Agency have initiated efforts to be more receptive to the needs and concern of the coal field citizens and the industry. Joint meetings with citizens\industry to encourage outreach and suggestions for developing annual oversight topics will encourage constructive citizen\ industry participation and will provide more meaningful feedback to the state and federal regulators. The State and OSM have focussed more effort and attention on reviewing "on-the-ground" achievements and have de-emphasized procedural reviews which have had limited utility.

The two Agencies have directed more resources into technical support and assistance. Initiatives involving GIS and electronic permitting should produce future dividends by improving and streamlining permitting while reducing costs to the industry and the public.

Such efforts, which foster creative and constructive participation among interest groups (Agencies, the public, and industry) must be encouraged and expanded.

SECTION 1:	INTRODUCTION
SECTION 2:	REVIEW OF STATE PROGRAMS
SECTION 3:	CONSULTATION WITH OTHER STATES
SECTION 4:	FEDERAL OVERSIGHT RELATIONSHIPS
<b>SECTION 5:</b>	<b>EVALUATION CRITERIA</b>
SECTION 6:	ENVIRONMENTAL SELF-AUDIT
SECTION 7:	REFERENCES
APPENDIX A:	HJR 10
APPENDIX B:	CONSTITUTIONAL AND STATUTORY GOALS
APPENDIX C:	HB 132



## SECTION 5: EVALUATION CRITERIA

The following pages include the criteria the Council used to assist them in evaluating the state's compliance and enforcement programs. EQC members filled out a similar set of questions after hearing information from each program. The answers to the questions were used to prepare the findings discussed in the *HJR 10 Compliance and Enforcement Study Final Report*.

Reviewers were asked to rate programs using the following criteria.

### COMPLIANCE/ENFORCEMENT EVALUATION CRITERIA

Draft -- 10/27/95

Program: \_\_\_\_\_ Presenter: \_\_\_\_\_

**Timeliness** -- *Happening or done at an appropriate time, especially at such a time as to be of help or service.*

**Considerations:** Are applications/requests/complaints/questions processed quickly? Are they resolved in a reasonable timeframe? Are violation notices issued soon after the situation is identified? . . .

**Notes on Presentations:**

Rating (circle one):	1	2	3	4	5
	unacceptable	poor	fair	good	excellent

**Comments on Rating:**

**Equity** -- *Fairness; impartiality; justice.*

**Considerations:** Are all who interact with the program treated with equal consideration and respect? Are penalties determined in a systematic manner, to yield consistent results regardless of "status" of violator? . . .

**Notes on Presentations:**

Rating (circle one):	1	2	3	4	5
	unacceptable	poor	fair	good	excellent

**Comments on Rating:**

**Consistency** -- *Agreement with what has already been done or expressed; conformity with previous practice.*

**Considerations:** Have similar violations generated similar responses over the last few years? Are variations justified and equitable? . . .

**Notes on Presentations:**

<b>Rating (circle one):</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
	unacceptable	poor	fair	good	excellent

**Comments on Rating:**

**Effectiveness** -- *Having an effect; producing a result. Active, not merely potential or theoretical.*

**Considerations:** Is the program's compliance/enforcement workload decreasing, stable, or increasing? What are the trends in numbers of non-compliances? What are the trends in severity of non-compliances? . . .

**Notes on Presentations:**

<b>Rating (circle one):</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
	unacceptable	poor	fair	good	excellent

**Comments on Rating:**

**Efficiency** -- *Ability to produce a desired effect, product, etc., with a minimum of effort, expense, or waste.*

**Considerations:** Are enforcement tools (including information and education) being used at the right time and place to minimize overlap, confusion, and expense? . . .

**Notes on Presentations:**

<b>Rating (circle one):</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
	unacceptable	poor	fair	good	excellent

**Comments on Rating:**

**OVERALL "APPROPRIATENESS"** -- *Right for the purpose; suitable; fit; proper.*

**BY PROGRAM** -- Has the program achieved a proper balance among enforcement tools to create an effective and efficient compliance program? . . .

**Rating (circle one):**            **1**                      **2**                      **3**                      **4**                      **5**  
                                 unacceptable            poor                      fair                      good                      excellent

**Comments on Rating:**

**ACROSS PROGRAMS** -- Are the approaches this program uses appropriately consistent with other agencies/programs, considering relative risk to public health and the environment? . . .

**Rating (circle one):**            **1**                      **2**                      **3**                      **4**                      **5**  
                                 unacceptable            poor                      fair                      good                      excellent

**Comments on Rating:**

**BY STATUTORY GOAL** -- Is the program meeting relevant statutory goals? Are the goals appropriate? . . .

**Rating (circle one):**            **1**                      **2**                      **3**                      **4**                      **5**  
                                 unacceptable            poor                      fair                      good                      excellent

**Comments on Rating:**





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## SECTION 6: VOLUNTARY ENVIRONMENTAL SELF-AUDITING

### Summary

As part of the EQC interim study on compliance and enforcement, the Council adopted HJR 10 study work plan Goal 7 which states that the council would

*Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412...*

The Council chose to conduct this effort through discussions between those most involved with the legislation which failed to pass during the 1995 Session.

Beginning in December 1995, a group of interested citizens formed a working group to discuss and analyze the concept of voluntary environmental self-audits as a method by which compliance with environmental regulations could be improved in the state of Montana. The incentives of providing immunity from prosecution for violations discovered through self-auditing and the provision of privilege for environmental audit report information were reviewed at length. The process was designed as a round table discussion of the policy concept and the incentive issues. The issues are complex and have significant public policy implications. There was no attempt to develop a consensus agreement between all the participants.

After considerable effort and dedicated involvement, the participants affirmed the concept of encouraging voluntary environmental self-audits. No common agreement could be reached regarding what incentives should be provided and no consensus legislation was recommended.

### Background

Attachment A includes a copy of HB 412 from the 1995 Legislative Session. This was a bill intended to encourage voluntary environmental self-auditing by providing for immunity and privilege of audit information. Despite significant amendment, the bill ultimately did not pass. Also included in Attachment A is a letter from the Governor encouraging the EQC to study this issue, the EQC Compliance and Enforcement Subcommittee work plan goal and directive, and a summary of the study process that followed. Working group participants are listed in Attachment B. A chronology of activities is summarized in Attachment C.

### Efforts

The working group responded to a questionnaire which summarized the various member positions on the issue of self-auditing. The responses received are shown in Attachment D. A review of the status of voluntary environmental self-auditing laws and policies in other states was conducted. The group

reviewed and analyzed a January 1996 EPA self-auditing policy, developed and reviewed a modification of that policy and reviewed Montana laws regarding access to documents and privilege of information (Attachment E). A comparison and analysis of HB 412 and the EPA January 1996 policy was conducted. The working group heard presentations on existing Montana small business compliance assistance programs and reviewed and provided written comments on a modified South Dakota self audit law (Attachment F). A revision of the South Dakota legislation was developed to incorporate written comments from the group and comments were solicited on the revision (Attachment G). The EQC received a presentation from staff and various members of the working group at a November 14, 1996 meeting.

## Results

A summary of the results of the working group effort is shown in Attachment H. The working group identified several elements that should be incorporated into a self-audit policy, but could not agree on a consensus bill or policy for the state. The EQC made no recommendation on the issue of self-auditing, adopted the findings in Attachment H, acknowledged the points of agreement and disagreement, and adopted the report on the issue.

ATTACHMENT A

OFFICE OF THE GOVERNOR

STATE OF MONTANA

MARC RACICOT  
GOVERNOR



STATE CAPITOL  
HELENA, MONTANA 59620-CE01

July 6, 1995

Jerry Noble, Chairman  
Environmental Quality Council  
Room 106, State Capitol  
Helena MT 59620

Dear Chairman Noble:

During the 1995 legislative session, Representative Scott Orr introduced a bill that would provide limited protection to companies that voluntarily disclose an environmental violation. This environmental self-evaluation bill, HB 412, was the focus of much attention, and although it was not approved by the Legislature, many legislators and other interested parties believed it deserved further discussion and debate.

As you are probably aware, several states have adopted some form of environmental voluntary disclosure legislation, and the EPA has recently changed its own policy in order to provide an incentive for industries to perform environmental audits and disclose violations. The incentive is a reduction in civil penalties assessed by EPA against those who disclose and correct the violations they find.

I would like to recommend to the EQC that it consider including in its interim work plan for enforcement and compliance (HJR 10) a study of and recommendation with respect to a policy on environmental self-evaluation and self-disclosure. Those whose input would be valuable to such a project include industry, environmental and public interest groups, and professional environmental auditing firms.

Our office has quite a bit of information compiled during the discussions of HB 412 that we would gladly make available to you should you decide to study this topic.

I appreciate your consideration of this request. Please let me know if you need any further explanation.

Sincerely,

A handwritten signature of Marc Racicot in dark ink.

MARC RACICOT  
Governor

HOUSE BILL 412  
1995 Legislative Session

INTRODUCED BY ORR, GROSFIELD, RYAN, HARP, FORRESTER

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING LIMITED PROTECTION TO AN OWNER OR OPERATOR OF A FACILITY THAT VOLUNTARILY DISCLOSES A VIOLATION OF AN ENVIRONMENTAL LAW; AND PROVIDING FOR A VOLUNTARY ENVIRONMENTAL SELF-EVALUATION AND REPORT AND AN EVIDENTIARY PRIVILEGE FOR THE REPORT; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN APPLICABILITY DATE, AND A TERMINATION DATE."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. Section 1. Purpose. The legislature finds that protection of the environment rests principally on the public's voluntary compliance with environmental laws and that the public will benefit from incentives to VOLUNTARILY identify and remedy environmental compliance issues VIOLATIONS. The legislature also finds that limited expansion of the protection against disclosure of voluntary self-evaluations of environmental compliance and against fines and penalties will encourage voluntary activities and will improve environmental quality. The legislature further finds that [sections 1 through 7] will ARE not INTENDED TO inhibit OR BE A SUBSTITUTE FOR the exercise of the regulatory authority by those AGENCIES entrusted with protecting Montana's environment.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 7], the following definitions apply:

(1) "Environmental law" means a STATE law, administrative rule, permit condition, OR license, or local regulation or ordinance designed to protect, enhance, or restore the environment and OR natural resources in the environment.

(2) "Environmental self-evaluation" means a voluntary self-evaluation, NOT OTHERWISE REQUIRED BY LAW OR REGULATORY ACTION, of a facility or operation regulated under environmental laws or of management systems related to the facility or operation, the PRIMARY purpose of which is to identify and prevent noncompliance ON A LONG-TERM BASIS and to improve compliance with environmental laws. An environmental self-evaluation may be conducted by the owner or operator of the facility or operation, by a parent company of the owner or operator of the facility or operation, by an employee or agent of the owner, operator, or parent company, or by one or more independent contractors.

(3) "Environmental self-evaluation report" means a report that is labeled "Environmental Self-Evaluation Report: Privileged Document", or the equivalent, and that is prepared as a result of an environmental self-evaluation. An environmental self-evaluation report may MUST contain materials collected or developed for the primary purpose OF and in the course of CONDUCTING an environmental self-evaluation, including. THESE MATERIALS MAY INCLUDE but ARE not limited to field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memorandums, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, and surveys. It may also include the following:

(a) a report that is prepared by the person or entity conducting the environmental self-evaluation

and that states the scope of the environmental self-evaluation, the information obtained, and conclusions and recommendations, together with exhibits and appendices;

(b) memorandums and documents analyzing portions or all of the environmental self-evaluation report and discussing implementation issues; and

(c) an implementation plan that addresses corrective action for noncompliance, improving current compliance, and preventing future noncompliance. ALL ENVIRONMENTAL SELF-EVALUATION REPORTS MUST:

(A) INCLUDE THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS CONDUCTED; AND

(B) IDENTIFY PROPOSED CORRECTIVE ACTIONS TO RESOLVE IDENTIFIED NONCOMPLIANCE ISSUES IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS. SET OF DOCUMENTS THAT ARE PREPARED AS A RESULT OF AN ENVIRONMENTAL SELF-EVALUATION. ALL DOCUMENTS THAT ARE PART OF AN ENVIRONMENTAL SELF-EVALUATION REPORT MUST CONTAIN THE DATE OR DATES ON WHICH THE ENVIRONMENTAL SELF-EVALUATION WAS CONDUCTED. AN ENVIRONMENTAL SELF-EVALUATION REPORT MUST:

(A) CONTAIN MATERIALS THAT WERE COLLECTED OR DEVELOPED FOR THE PRIMARY PURPOSE OF AND IN THE COURSE OF CONDUCTING AN ENVIRONMENTAL SELF-EVALUATION AND THAT MAY INCLUDE BUT ARE NOT LIMITED TO FIELD NOTES AND RECORDS OF OBSERVATIONS, FINDINGS, OPINIONS, SUGGESTIONS, CONCLUSIONS, DRAFTS, MEMORANDUMS, DRAWINGS, PHOTOGRAPHS, COMPUTER-GENERATED OR ELECTRONICALLY RECORDED INFORMATION, MAPS, CHARTS, GRAPHS, AND SURVEYS;

(B) STATE THE SCOPE OF THE ENVIRONMENTAL SELF-EVALUATION, THE INFORMATION OBTAINED, AND CONCLUSIONS AND RECOMMENDATIONS WITH A REFERENCE TO SUPPORTING DATA OR SUPPORTING INFORMATION THAT IS TO BE GENERATED OR THAT HAS ALREADY BEEN GENERATED FOR PURPOSE OF THE REPORT;

(C) IDENTIFY PROPOSED ACTIONS TO RESOLVE IDENTIFIED VIOLATIONS IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS; AND

(D) INDICATE IDENTIFIED VIOLATIONS THAT HAVE BEEN RESOLVED OR INDICATE THAT A PLAN HAS BEEN IMPLEMENTED TO RESOLVE THE VIOLATIONS IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS.

(4) "Voluntarily disclosed violation" means a disclosure:

(a) of a violation, the knowledge of which arises out BECAUSE of an environmental self-evaluation;

(b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

(c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

(d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION in a reasonably diligent manner AND CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE PLAN APPROVED BY THE REGULATORY AGENCY SUBMITS TO THE APPROPRIATE REGULATORY AGENCY, IN WRITING, THE FOLLOWING INFORMATION:

(I) THE DATE OF THE SELF-EVALUATION THAT IDENTIFIED THE VIOLATIONS;

(II) A DESCRIPTION OF THE VIOLATION, INCLUDING ALL DATA PERTINENT TO THE DETERMINATION THAT A VIOLATION EXISTED;

(III) THE ACTION BEING UNDERTAKEN TO CORRECT THE VIOLATION;

(IV) AN ESTIMATED TIMETABLE FOR CORRECTING THE VIOLATION; AND

(V) A COMMITMENT TO DILIGENT RESOLUTION OF THE VIOLATION;

(e) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation AND RESOLUTION of the issues VIOLATIONS identified in the disclosure PURSUANT TO APPLICABLE ENVIRONMENTAL LAWS; and

(f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory authority.

NEW SECTION. Section 3. Limited privilege for voluntary self-evaluations. (I) Subject to the limitations described in [section 4], an environmental self-evaluation report is privileged and is not discoverable or admissible as evidence in a civil, criminal, or administrative proceeding.

(2) Unless disclosure constituted a waiver of the privilege under [section 4(4)], a person who or entity that conducted an environmental self-evaluation OR PREPARED AN ENVIRONMENTAL SELF-EVALUATION REPORT or ANY PERSON OR ENTITY IDENTIFIED IN [SECTION 4(2)] to whom the results were disclosed cannot be compelled to testify regarding any matter that was the subject of the environmental self-evaluation and REPORT OR ANY MATTER that is addressed in OR the environmental self-evaluation report.

NEW SECTION. Section 4. Limitations on privilege for environmental self-evaluation. (1) The privilege granted by [section 3] does not apply to the extent that it is waived by the owner or operator of a facility or operation at which an environmental self-evaluation was conducted OR TO THE EXTENT THAT THE OWNER OR OPERATOR CONSENTS TO DISCLOSURE.

(2) Disclosure of the environmental self-evaluation report or any information generated by BECAUSE OF the environmental self-evaluation under the following circumstances does not constitute a waiver of the privilege granted by [section 3]:

(a) disclosure to:

(i) an employee of the owner or operator of the facility or operation evaluated;

(ii) an employee of a parent company of the owner or operator of the facility or operation evaluated;

(iii) an agent or legal representative of the owner, operator, or parent company; or

(iv) an independent contractor retained by the owner, operator, or parent company to address an issue or issues raised IDENTIFIED by the environmental self-evaluation REPORT;

(b) disclosure made under the terms of a confidentiality agreement between the owner or operator OR THE OWNER'S OR OPERATOR'S AGENT and a potential purchaser OR THE PURCHASER'S AGENT of the facility or operation; or

(c) disclosure made under the terms of a LAWFUL confidentiality agreement between governmental officials and the owner or operator.

(3) In a civil, criminal, or administrative proceeding, a court or administrative tribunal BODY of record, after an in camera review consistent with the Montana Rules of Civil Procedure, shall require disclosure of material THE REPORT for which the privilege described in [section 3] is asserted if the court or administrative tribunal BODY determines that:

(a) the privilege is asserted for a fraudulent purpose;

(B) THE ENVIRONMENTAL SELF-EVALUATION REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION:

(I) IN AN INVESTIGATION OR IN AN ADMINISTRATIVE OR JUDICIAL PROCEEDING THAT WAS UNDER WAY OR IMMINENT; OR

(II) FOR WHICH THE PERSON OR ENTITY HAD BEEN PROVIDED WRITTEN



NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED;

(b)(C) the material REPORT is not subject to the privilege; or

(c)(D) even if subject to the privilege, the material REPORT shows evidence of noncompliance with environmental laws and shows that appropriate efforts to achieve compliance with the ENVIRONMENTAL laws were not promptly initiated and pursued TO COMPLETION TO RESOLVE THE VIOLATION IN COMPLIANCE WITH APPLICABLE ENVIRONMENTAL LAWS with reasonable diligence upon discovery of noncompliance; OR

(E) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT DEMONSTRATES A CLEAR, PRESENT, AND SUBSTANTIAL IMPENDING DANGER TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT IN AREAS OUTSIDE THE FACILITY PROPERTY.

(4) A party asserting the privilege granted by [section 3] has the burden of demonstrating the applicability of the privilege, including necessary proof PRIMA FACIE EVIDENCE that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence TOWARD COMPLETION AND INCLUDING A COMMITMENT THAT COMPLETION WILL BE ACCOMPLISHED IN ACCORDANCE WITH APPLICABLE ENVIRONMENTAL LAWS. However, a party, INCLUDING THE STATE IN A CRIMINAL PROCEEDING, seeking disclosure under subsection (3)(a), (3)(B), (3)(C), OR (3)(E) has the burden of proving that the privilege is asserted for a fraudulent purpose. In a criminal proceeding, the state has the burden of proving the reasons for disclosure set forth in subsection (3)(b) PROOF.

(5) If, based on information obtained from a source independent of an environmental self-evaluation report, the state has probable cause to believe that a criminal offense has been committed under an environmental law, the state may obtain an environmental self-evaluation report pursuant to a search warrant, criminal subpoena, or discovery, as allowed by the law governing criminal procedure. The state shall immediately place the report under seal and, may not review or disclose the contents of the report, AND SHALL NOTIFY THE OWNER OR OPERATOR OF ITS POSSESSION OF THE REPORT. Within 30 days after the state obtains the report PROVIDES NOTICE, the owner or operator that prepared the report or caused it to be prepared OR THE STATE'S ATTORNEYS may file with the appropriate court or administrative tribunal BODY a petition asserting the privilege granted by [section 3] and requesting an in camera review of the report. Failure UNLESS THE STATE FILES A PETITION, FAILURE by the owner or operator to file the petition waives the privilege. The court or administrative tribunal BODY shall IMMEDIATELY issue an order scheduling an in camera review within 45 days of the filing of the petition. The purpose of the review is to determine whether the environmental self-evaluation report or portions of it are privileged or subject to disclosure. The order must allow the state's attorneys to remove the seal from and to review the environmental self-evaluation report. The order must place appropriate limitations on distribution and review of the report to protect against unnecessary disclosure. A state attorney may consult with enforcement agencies regarding the contents of the report as necessary to prepare for the in camera review. However, the information used in preparation for the in camera review may not be used in any investigation or legal proceeding and must otherwise be kept confidential unless and until the information is required to be disclosed.

(6) Failure to comply with the review, disclosure, or use prohibitions of this section is grounds for EXCLUSION OR suppression, in a civil, criminal, or administrative proceeding, of any evidence arising or derived from unauthorized review, disclosure, or use. A party who fails to comply with this section has the burden of proving that proffered evidence did not arise from and was not derived from

unauthorized activity.

(7) The parties may at any time stipulate to entry of an order directing that specific information contained in ALL OR A PORTION OF an environmental self-evaluation report is or is not subject to the privilege granted by [section 3].

(8) In making a disclosure determination, the court or administrative tribunal BODY may compel the disclosure only of those portions of an environmental self-evaluation report that are NOT PRIVILEGED AND ARE relevant to issues in dispute in the proceeding.

NEW SECTION. Section 5. Exceptions to the environmental self-evaluation privilege. The privilege granted by [section 3] does not extend to:

(1) documents, communications, data, reports, or other information required to be collected, developed, maintained, or reported to a regulatory agency pursuant to environmental laws;

(2) information obtained by observation, sampling, or monitoring by a regulatory agency, EXCEPT TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE; or

(3) information obtained BY A REGULATORY AGENCY from a source independent of the environmental self-evaluation OR, EXCEPT TO THE EXTENT DERIVED FROM A VOLUNTARY DISCLOSURE;

(4) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF THE ENVIRONMENTAL SELF-EVALUATION AND INDEPENDENT OF THE ENVIRONMENTAL SELF-EVALUATION REPORT; OR

(5) ANY INFORMATION NOT PRIVILEGED, PURSUANT TO [SECTION 3] OR OTHERWISE, THAT IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE.;

(6) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS RELEVANT IN A CIVIL ACTION FOR ALLEGED DAMAGE TO REAL PROPERTY OR TO TANGIBLE PERSONAL PROPERTY IN AREAS OUTSIDE OF THE FACILITY PROPERTY PROVIDED THAT THE CAUSES OF ACTION ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY THAT PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THE ACTION; OR

(7) INFORMATION CONTAINED IN THE ENVIRONMENTAL SELF-EVALUATION REPORT THAT IS RELEVANT IN A CIVIL ACTION FOR ALLEGED PERSONAL INJURY PROVIDED THAT THE CAUSES OF ACTION ASSERTED ARE NOT FOR ALLEGED VIOLATIONS OF ENVIRONMENTAL LAWS AND THAT ONLY THAT PORTION OF THE REPORT MAY BE DISCLOSED THAT IS RELEVANT TO THAT ACTION.

NEW SECTION. Section 6. Preservation of other privileges. [Sections 1 through 7] do not limit, EXPAND, waive, or abrogate the scope or nature of any statutory or common-law privilege, including, without limitation, the work product doctrine and the attorney-client privilege.

NEW SECTION. Section 7. Limited protection for voluntary disclosures of violation. (1) A civil, criminal, or administrative fine or other penalty may not be SOUGHT OR imposed by a court or administrative tribunal BODY for a voluntarily disclosed violation of an environmental law, EXCEPT FOR A VIOLATION OF TITLE 82, CHAPTER 4, PART 1 OR 2, FIRST MADE KNOWN ONLY BY THE ENTITY CONDUCTING THE ENVIRONMENTAL SELF-EVALUATION, unless:

(1)(A) the violation was intentionally and willfully committed by the person or entity making the disclosure;

(2)(B) action to correct the violation was not initiated within a reasonable period of time DOES NOT MEET THE REQUIREMENTS OF [SECTION 2(4)(D)]; or

(3)(C) the violation resulted in significant environmental harm or a significant threat to public health. HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT A CLEAR, SUBSTANTIAL, AND IMMEDIATE THREAT OF ACTUAL HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.

(2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE REGULATORY AUTHORITY OR WITHIN A REASONABLE TIME AFTER DISCLOSURE IS MADE. ALL INFORMATION SUBMITTED TO A REGULATORY AGENCY REGARDING A VOLUNTARILY DISCLOSED VIOLATION IS PUBLIC INFORMATION.

(3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN ADMINISTRATIVE TRIBUNAL BODY TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT, THAT WHEN TAKEN TOGETHER ARE SERIOUS, AND THAT WERE BECAUSE OF SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS WITHIN THE 3-YEAR PERIOD PRIOR TO THE DATE OF DISCLOSURE.

NEW SECTION. SECTION 8. APPLICABILITY. [THIS ACT] APPLIES TO:

(1) ONLY THOSE ENVIRONMENTAL SELF-EVALUATIONS THAT RESULT IN ENVIRONMENTAL SELF-EVALUATION REPORTS;

(2) VOLUNTARILY DISCLOSED VIOLATIONS THAT ARE DISCLOSED AFTER [THE EFFECTIVE DATE OF THIS ACT]; AND

(3) ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT]. (1) THE EVIDENTIARY PRIVILEGE CREATED BY [THIS ACT] APPLIES TO ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PREPARED AS A RESULT OF ENVIRONMENTAL SELF-EVALUATIONS AFTER [THE EFFECTIVE DATE OF THIS ACT] AND BEFORE [THE TERMINATION DATE OF THIS ACT].

(2) THE LIMITED PROTECTION FOR VOLUNTARY DISCLOSURES CREATED BY [THIS ACT] APPLIES TO VOLUNTARY DISCLOSURES THAT ARE MADE DURING THE PERIOD BEGINNING ON [THE EFFECTIVE DATE OF THIS ACT] AND ENDING ON [THE TERMINATION DATE OF THIS ACT].

(3) [THIS ACT] APPLIES TO ALL LEGAL ACTIONS AND ADMINISTRATIVE ACTIONS COMMENCED ON OR AFTER [THE EFFECTIVE DATE OF THIS ACT].

(4) ENVIRONMENTAL SELF-EVALUATION REPORTS THAT ARE PRIVILEGED UNDER [THIS ACT] AND VOLUNTARY DISCLOSURES THAT ARE PROTECTED UNDER [THIS ACT] MUST REMAIN PRIVILEGED AND PROTECTED AFTER [THE TERMINATION DATE OF THIS ACT].

NEW SECTION. SECTION 9. EFFECTIVE DATE. [THIS ACT] IS EFFECTIVE ON PASSAGE AND APPROVAL.

NEW SECTION. SECTION 10. TERMINATION. [THIS ACT] TERMINATES JUNE 30, 2001.

## ATTACHMENT A (cont.)

### GOAL AND STUDY PROCESS

Taken from the September 1, 1995 Environmental Quality Council's HJR 10 Compliance and Enforcement Study memo describing study goals, options, and processes is the following Council imposed directive:

*Goal 7: Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412 which failed to pass during the 1995 Session.*

Approach: The Council will analyze the issues raised during the HB 412 debate and also draw from recent EPA and other state action on this issue. Again, this issue would require extensive public and agency involvement.

Process: This issue, complex but narrowly defined, may be appropriate for a thorough analysis by a subcommittee or similar Council subunit."

### Environmental Self Audit Working Group Process Summary

November 1995 - November 1996

33 persons on mailing list

20 active participants

- Held 4 meetings: December 1995, February, April, and July 1996.
- Provided a written position questionnaire.
- Provided written comments on proposed initiatives twice.
  - Reviewed other states' self audit legislative initiatives.
  - Reviewed EPA self audit policy.
  - Reviewed Montana's confidentiality/trade secret provisions.
  - Reviewed a modified EPA policy for Montana statutes.
  - Reviewed case histories and hypothetical audit examples with small business assistance programs.
  - Discussed the South Dakota self audit legislation and provided written comments.
  - Reviewed modified South Dakota legislation and provided written comments.

## ATTACHMENT B

### ENVIRONMENTAL SELF AUDIT WORKING GROUP..1996

Anne Hedges, MEIC, Helena, MT 59601  
David Owen, Montana Chamber of Commerce, Helena,  
Jeff Barber/Julia Page/Ted Lange, Northern Plains Resource Council, Billings  
Don Allen, Helena  
Eric Finke, EPA Montana Office, Helena  
Sen. Steve Doherty, Great Falls  
Susan Callaghan/Mike Pichette, Montana Power Company, Butte  
Tom Ebzery, Billings  
George Schunk, MT Department of Justice, Helena  
Judy Browning, Office of the Governor  
Peggy Trenk, WETA, Helena  
Ray Martinich, Montana Refining Co., Great Falls  
Rep. Scott Orr, Libby  
Richard Parks, NPRC, Gardiner  
Robert Booher, Dept. Env. Quality, Helena  
Pam Langley, Helena  
Russ Hill, Montana Trial Lawyer's Association, Helena  
J.R. McPherson, PacifiCorp, Lake Oswego, OR.  
Janet Ellis, Montana Audubon Council, Helena  
John North, Dept. Environmental Quality, Helena  
John Arrigo, Dept. Environmental Quality, Helena  
John Schontz, Helena  
Karl Englund, Missoula  
Mike Voegel, MSU Extension Service, Bozeman  
Todd McFadden, MSU Extension Service, Bozeman  
Mark Lambrecht, Small Business Assistance, Dept. Commerce, Helena  
Page Dringman, Helena  
Russ Ritter, Washington Corp., Helena  
Debbie Smith, Helena,  
Dick Juntunen, Clancy  
Frank Crowley, Helena  
Gail Abercrombie, MT Petroleum Assn., Helena  
Helen Christensen, MT State AFL-CIO, Helena

## ATTACHMENT C

### ENVIRONMENTAL SELF AUDIT WORKING GROUP CHRONOLOGY

#### CHRONOLOGY OF ACTIVITIES

- November 17, 1995.  
At the direction of the Environmental Quality Council, its staff wrote to interested and affected parties who testified regarding HB 412 during the 1995 Legislative Session suggesting a review and analysis of the issues.
  - \* **Purpose:** Referencing HB 412, a July 6, 1995 letter from Governor Racicot to the EQC recommended that the EQC Compliance and Enforcement Subcommittee conduct "**a study of and recommendation with respect to a policy on environmental self-evaluation and self-disclosure**" as part of the Council's required review of state environmental compliance and enforcement programs (HJR 10).
  - \* The EQC Compliance and Enforcement Subcommittee adopted HJR 10 study workplan Goal 7 which states that the council would "**Investigate the role that environmental audits play in the compliance and enforcement issue. This goal will include an analysis of the immunity and confidentiality issues raised by HB 412...**"
  - \* HJR 10 requests that the EQC complete its study and **report its finding and recommendations** to the 55th Legislature in 1997.
- MEETING #1 December 1, 1995 Scoping Meeting.  
A decision was made by the interested parties to form a working group to conduct an analysis of the issues during the course of two more meetings. **A report would be made to the EQC's Compliance and Enforcement study Subcommittee as to whether or not progress could be made.** Next meeting scheduled for February 15.
- December 21, 1995.  
At the request of the working group, EQC staff developed and mailed a position sampling questionnaire to all working group members.
- February 1, 1996.  
EQC staff provided copies and summaries of working group member position statements, summary information of self audit legislation from other states, and a copy of a December 22, 1995 EPA self audit policy.
- MEETING #2 February 15, 1996  
The working group decided to review the EPA policy further, to determine whether it could be utilized within Montana's current statutes, and to investigate a trade secrets type access limitation for audit documents. Next meeting scheduled for April 10.

- April 3, 1996.  
As requested, the EQC staff provided the working group with a rough draft discussion document which sought to integrate the EPA self audit policy into the Montana situation, identifying needed changes to state law. A review of state laws on confidentiality was also provided.
- MEETING #3 April 10, 1996  
The working group reviewed the EPA policy and discussed its merits as policy or as statute for Montana. The group had several questions about the meaning and interpretation of the policy and whether or not it was adequate to address the issue of self auditing in this state. A decision was made to hold another meeting. Group members volunteered to develop some "evidentiary protection" language for the policy and create some hypothetical audit situations to test against the EPA policy.
- MEETING #4 July 30, 1996  
Presentations were made by the DEQ Small Business Ombudsman and the MSU Extension Service pollution prevention small business assistance office. Hypothetical compliance inspection situations were discussed in the current context and with the proposed self audit policy in place. The South Dakota self audit law was discussed. One of the working group members volunteered to modify that legislation incorporating written comments and concerns from other group members.
- August 16, 1996 - Staff received written comments on South Dakota self audit law and forwarded them to Susan Callaghan for incorporation into the document and revision.
- October 18, 1996 - Revised South Dakota self audit law received October 16. EQC staff provided copies to working group members with request for written comments by November 1.
- November 14, 1996 - EQC staff and working group members present results to EQC Subcommittee on Compliance and Enforcement.

# ATTACHMENT D

## SUMMARY OF WORKING GROUP MEMBER POLICY POSITIONS: JANUARY 1996

RESPONSE BY	ENCOURAGE SELF AUDITS?			PROVIDE IMMUNITY?			PROVIDE PRIVILEGE?		USE HB 412 AS A BEGINNING?	
	GENER-ALLY	BY LAW	BY POLICY	YES	NO	NOT CRIMINAL	YES	NO	YES	NO
George Schunk Attorney General's office	YES		X			X		X		
Don Allen Wood Products Association	YES	X		X			X		X	
Karl Englund	YES		X		X	X		X		
Peggy Trenk West Env. Trade Association	YES	X		X			X		X	
Susan Callahan Montana Power Company	YES	X		X		X	X		X	
Judy Browning Governor's Office	YES	X		X		X		X		
Anne Hedges MT Env. Information Center	YES		X		X	X		X		X
Russell Hill MT Trial Lawyer's Assn	YES	X			X	X		X		
Rep. Scott Orr	YES	X		X						
Tom Ebzery Exxon Co.	YES	X		X		?	X		X	
Richard Parks\Ted Lange N. Plains Resource Council	YES		X		X	X		X		X
Ray Martinich Montana Refining Co.	YES	X		X			X			

*This information was assimilated from the responses to the questionnaire. No attempt was made to interpret responses by implication and force them into this matrix with the exception of a "no" response to the question of immunity, which automatically translated into a "no" response on the issue of criminal immunity. Many responses came associated with qualifiers; "yes, except" or "no, unless" type responses. Unfortunately, the limits of matrix space leave us with only the cold harsh yes or no's. The compromise appears to be in the qualifiers which you can discuss at length on Feb. 15th.*



# ATTACHMENT E

(CITE AS: 60 FR 66706)   NOTICES

## ENVIRONMENTAL PROTECTION AGENCY

### ***INCENTIVES for SELF-POLICING:***

#### ***Discovery, Disclosure, Correction and Prevention of Violations***

Noticed: Friday, December 22, 1995

ACTION: Final Policy Statement.

**SUMMARY:** The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

**DATES:** This policy is effective January 22, 1996.

**FOR FURTHER INFORMATION CONTACT:** Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

#### **SUPPLEMENTARY INFORMATION:**

##### **1. Explanation of Policy**

###### **A. Introduction**

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct. The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

## B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits. EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".)

Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

## C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII-A-76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

## D. INCENTIVES for SELF-POLICING

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

### 1. Eliminating Gravity-Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any documented procedure for self-policing, where the company can show that it has a compliance management program that meets the

criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II-F-39, II-F-28, and II-F-18).

## 2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

## 3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

## 4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

## E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity-based penalties by 75%.

### 1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations.

The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, e.g., II-F-39, II-E-18, and II-G-18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

### 2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, e.g., II-C-48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate

reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below).

Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred ...." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

### 3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

### 4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

## 5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"--a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

## 6. No Repeat Violations

In response to requests from commenters (see, e.g., II-F-39 and II-G-18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

## 7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, e.g., II-F-39 and II-G-18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II-E- 60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

## 8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

## F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons: 1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United

States v. Nixon, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., United States v. Dexter, 132 F.R.D. 8, 9-10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information--such as health studies or contaminated sediment data--and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "in camera" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (See, e.g., Docket, II-C-21, II-C-28, II-C-52, IV-G- 10, II-C-25, II-C-33, II-C-52, II-C-48, and II-G-13 through II-G-24.)

#### G. Effect on States

The final policy reflects EPA's desire to develop fair and effective INCENTIVES for SELF-POLICING that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions needed to deter such misconduct, there is no need for EPA action.

#### H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.



## II. Statement of Policy: INCENTIVES for SELF-POLICING

### Discovery, Disclosure, Correction and Prevention

#### A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

#### B. Definitions

For purposes of this policy, the following definitions apply: "Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

- (a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;
- (b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
- (c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
- (d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;
- (e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
- (f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

#### C. INCENTIVES for SELF-POLICING

##### 1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

##### 2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

##### 3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation



does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

#### 4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

### D. Conditions

#### 1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

#### 2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

#### 3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

#### 4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

## 5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

## 6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

## 7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

- (a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
- (b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

## 8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

## 9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

## E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

## F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

## G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

## H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

- (a) changes in compliance behavior within the regulated community, including improved compliance rates;
- (b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;
- (c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;
- (d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

## I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

## ATTACHMENT E (cont.)

### MODIFIED EPA SELF AUDIT POLICY AND ANALYSIS OF PRIVILEGE

**SECTION 1.** Title. POLICY TO ENCOURAGE VOLUNTARY COMPLIANCE BY MEANS OF ENVIRONMENTAL AUDITS

**SECTION 2. Montana Authority.**

Clean Air Act of Montana 75-2-101 *et seq.*, MCA

Asbestos Control Act 75-2-501 *et seq.*, MCA

Montana Radon Control Act 75-3-601 *et seq.*, MCA

Montana Water Quality Statutes 75-5-101 *et seq.*, MCA

Public Water Supply Statutes 75-6-101 *et seq.*, MCA

Montana Solid Waste Act 75-10-201 *et seq.*, MCA

Montana Hazardous Waste and Underground Storage Tank Act 75-10-401 *et seq.*, MCA

Motor Vehicle Recycling and Disposal Statutes 75-10-501 *et seq.*, MCA

State Superfund Statutes 75-10-701 *et seq.*, MCA

Montana Megalandfill Siting Act 75-10-901 *et seq.*, MCA

Infectious Waste Management Act 75-10-1001 *et seq.*, MCA

Montana Underground Storage Tank Installer Licensing and Permitting Act 75-11-201 *et seq.*, MCA

Montana Strip and Underground Mine Reclamation Act 82-4-201 *et seq.*, MCA

Montana Metal Mine Reclamation Act 82-4-301 *et seq.*, MCA

Montana Opencut Mining Act 82-4-401 *et seq.*, MCA

Montana Agricultural Chemical Ground Water Protection Act 80-15-101 *et seq.*, MCA

Montana Pesticides Act 80-8-101 *et seq.*, MCA

**SECTION 3. Policy.** It is the policy of this state to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of state environmental requirements.

**SECTION 4. Definitions.** Unless the context requires otherwise, in this policy, the following definitions apply:

(1) "Environmental audit" means a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

(2) "Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.

(3) "Environmental requirement" means any legally enforceable obligations including those environmental laws and regulations and those in permits or licenses issued under the environmental laws and regulations.

(4) "Department" means the department of environmental quality provided for in 2-15-3501 or the department of agriculture provided for in 2-15-3001.

(5) "Due diligence" means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through at least the following elements:

(a) compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluations of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

- (d) efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;
  - (e) appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
  - (f) procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.
- (6) "Gravity-based penalty" means the punitive portion of the penalty rather than that portion representing an economic gain from non-compliance.
- (7) "Regulated entity" means any entity, including a federal, state, or municipal agency or facility, regulated under state environmental requirements.

#### **SECTION 6. Incentives for Environmental Auditing.**

To encourage regulated entities to perform environmental audits, the department shall:

- (1) waive 100% of the gravity component of the penalty where the violation was found through an environmental audit or where due diligence can be demonstrated, and if all of the limitations in [SECTION 7] are met;
- (2) waive 75% of the gravity component where the violation was discovered by any other voluntary means, if the limitations on incentives listed in [SECTION 7 subsection 7(2) through (9)] are met. The department retains the full discretion to recover the economic benefit, but the department may waive the economic benefit if all the conditions in [SECTION 7] are met and the economic benefit is insignificant.
- (3) not recommend for criminal prosecution a regulated entity that voluntarily discovers and promptly discloses and corrects violations through environmental audits or due diligence, and meets all limitations set out in [SECTION 7], unless there is:
  - (a) a prevalent management philosophy or practice that conceals or condones violations; or
  - (b) there is a high-level official's conscious involvement or willful blindness to the violations; and
- (4) not request or use an environmental audit report to initiate a civil or criminal investigation of a regulated entity.

**SECTION 7. Limitations on incentives for environmental audits.** (1) The violation must have been discovered during a systematic, objective, and periodic environmental audit, or a documented systematic procedure which reflects due diligence. The department may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made public.

- (2) The violation must have been discovered voluntarily, and not through a monitoring, sampling or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or by consent agreement.
- (3) The violation must be disclosed within 10 days of discovery that a violation has or may have occurred and the disclosure must be submitted in writing to the department.
- (4) The violation must have been discovered prior to:
  - (a) an inspection or investigation by the department or regulatory agency, or the issuance of an information request;
  - (b) the filing of a complaint by a third party;
  - (c) the reporting of the violation to the department or another governmental agency by a "whistleblower"; or
  - (d) the imminent discovery by the department or a regulatory agency.
- (5) The regulated entity must correct the violation within 60 days, and remedy any harm to the environment or human health. If more than 60 days is needed to correct the violation, the regulated entity must notify the department in writing before the 60 day period has elapsed. Where appropriate, the department may require that to satisfy subsections (5) and (6), a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.
- (6) The regulated entity must take steps to prevent recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts.
- (7) The violation must not have occurred previously within the last 3 years, or be part of a pattern of violations by the facility's parent organization within the last 5 years. For purposes of this subsection a violation is:
  - (a) any violation of federal, state, or local environmental requirements identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
  - (b) any act or omission for which the regulated entity has previously received penalty mitigation from the Environmental Protection Agency, the department, a state agency or local agency.
- (8) The violation did not:
  - (a) result in any serious actual harm or present an imminent and substantial endangerment; or
  - (b) violate the terms of any judicial or administrative order or consent agreement.
- (9) The regulated entity cooperates as requested by the department and provides such information as is necessary and requested by the department to determine applicability of this policy.

#### **SECTION 8. Amended Statutory Sections.**

(1) Section 82-4-361, MCA, is amended to read:

**"82-4-361. Violation — penalties — waiver.** (1) (a) Except as provided in subsections (1)(b) and (2), a civil penalty of not less than \$100 or more than \$1,000 for each of the following violations, an additional civil penalty of not less than \$100 or more than \$1,000 for each day during which the violation continues, and an injunction from continuing the violation may be imposed against:

- (i) a person or operator who violates a provision of this part, a rule or order adopted under this part, or a term or condition of a permit; or
  - (ii) any director, officer, or agent of a corporation who willfully authorizes, orders, or carries out a violation of a provision of this part, a rule or order adopted under this part, or a term or condition of a permit.
- (b) If the violation created an imminent danger to the health or safety of the public or caused significant environmental harm, the maximum penalty is \$5,000 for each day of violation.
- (2) (a) The department may bring an action for a restraining order or a temporary or permanent injunction against an operator or other person violating or threatening to violate an order adopted under this part.
- (b) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent

potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection.

(c) The civil penalties provided for in this section may be waived for a violation that is discovered through an environmental audit that is conducted pursuant to the requirements in [SECTIONS 1 through 7] of [this policy].

(3) The department shall notify the person or operator of the violation. The department shall issue a statement of proposed penalty within 30 days after notice of the violation. The person or operator, by filing a written request within 20 days of receipt of the notice of proposed penalty, is entitled to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be assessed is proper. After the hearing or after the time for requesting a hearing has expired, the board shall make findings of fact and issue a written decision as to the occurrence of the violation and whether the amount of penalty is warranted. The board shall order the payment of a penalty in that amount. The person or operator shall remit the amount of the penalty or petition for judicial review within 30 days of receipt of the order. A person or operator who fails to request the hearing provided for in this subsection or who fails to petition for judicial review within 30 days of receipt of the order forfeits that person's or operator's right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department."

{Internal References to 82-4-361

82-4-305 82-4-331 82-4-335}

2. Section 82-4-441, MCA, is amended to read:

**"82-4-441. Penalty -- enforcement.** (1) A person who violates any of the provisions of this part, rules adopted under this part, or provisions of a contract for reclamation:

(a) shall pay a civil penalty of not less than \$100 or more than \$1,000 for the violation;

(b) shall pay an additional civil penalty of not less than \$100 or more than \$1,000 for each day during which a violation continues following the service of notice of the violation; and

(c) may be enjoined from continuing the violation as provided in this section.

(2) The civil penalties provided for in this section may be waived for a minor violation if it is determined that the violation does not represent potential harm to public health, public safety, or the environment and does not impair the administration of this part. The board shall adopt rules to implement and administer a procedure for waiver of a penalty under this subsection.

(3) The civil penalties provided for in this section may be waived for a violation that is discovered through an environmental audit that is conducted pursuant to the requirements in [SECTIONS 1 through 7] of [this policy].

~~(3)~~(4) The department shall notify the person or operator of the violation. The person or operator is entitled, by filing a written request within 20 days of receipt of the notice of violation, to a hearing on the issues of whether the alleged violation has occurred and whether the penalty proposed to be imposed is proper. The department shall issue a statement of proposed penalty no more than 10 days after notice of violation. After the hearing or after the time for requesting a hearing has expired, the board shall make findings of fact, issue a written decision as to the occurrence of the violation and the amount of penalty warranted, and order the payment of a penalty in that amount. The person or operator shall remit the amount of the penalty within 30 days of the order. If the person or operator wishes to obtain judicial review of the assessment, the person or operator shall submit with the penalty a statement that the penalty is being paid under protest and the department shall hold the payment in escrow until judicial review is complete. A person or operator who fails to request and submit testimony at the hearing provided for in this subsection or who fails to pay the assessed penalty under protest within 30 days of the order assessing the penalty forfeits the right to seek judicial review of the violation or penalty determinations. These penalties are recoverable in an action brought by the department in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the openpit mine is located.

~~(4)~~(5) The department may bring an action to enjoin an operator or other person violating or threatening to violate this part, rules adopted pursuant to this part, or a contract made pursuant to this part in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the openpit mine is located."

{Internal References to 82-4-441. None }

**SECTION 9. Applicability.** This policy applies to the assessment of penalties for any violations under the statutes listed in **[SECTION 2]**.

#### **IMMUNITY ANALYSIS:**

#### **PROTECTION FROM CIVIL, CRIMINAL, OR ADMINISTRATIVE FINE OR PENALTY FOR VOLUNTARY DISCLOSURES.**

EQC staff did not develop a specific "discussion" document for this topic. It might be helpful for the working group to compare the protections afforded in the EPA policy set out above and the protections set out in House Bill 412 (HB 412) below.

The environmental audit policy outlined above offers penalty mitigation incentives to regulated entities that detect and correct violations on their own, as long as they are detected by means of an environmental audit or any other voluntary, systematic review that demonstrates "due diligence"; they are disclosed to department; and they meet specific conditions. The department may not request audit reports to initiate civil or criminal investigations.

HB 412 granted limited protection for voluntary disclosures of violations. HB 412 prohibited a civil, criminal, or administrative fine or other penalty from being imposed by a court or administrative body for voluntarily disclosed violations of environmental law with specific limitations. The relevant sections of HB 412 are set out below.

#### **NEW SECTION. Section a.**

**Limited protection for voluntary disclosures of violation.** (1) A civil, criminal, or administrative fine or other penalty may not be ~~SOUGHT OR~~ imposed by a court or administrative ~~tribunal~~ **BODY** for a voluntarily disclosed violation of an environmental law, EXCEPT FOR A VIOLATION OF TITLE 82, CHAPTER 4, PART 1 OR 2, FIRST MADE KNOWN ONLY BY THE ENTITY CONDUCTING THE ENVIRONMENTAL SELF-EVALUATION, unless:

~~(1)~~(A) the violation was intentionally and willfully committed by the person or entity making the disclosure;

~~(2)~~(B) action to correct the violation ~~was not initiated within a reasonable period of time~~ **DOES NOT MEET THE REQUIREMENTS OF**

[SECTION 2(4)(D)]; or

~~(3)(C) the violation resulted in significant environmental harm or a significant threat to public health. HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT A CLEAR, SUBSTANTIAL, AND IMMEDIATE THREAT OF ACTUAL HARM TO THE PUBLIC HEALTH OR TO THE ENVIRONMENT.~~

(2) THE PERSON OR ENTITY SHALL PROVIDE INFORMATION IN WRITING SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE REGULATORY AUTHORITY OR WITHIN A REASONABLE TIME AFTER DISCLOSURE IS MADE. ALL INFORMATION SUBMITTED TO A REGULATORY AGENCY REGARDING A VOLUNTARILY DISCLOSED VIOLATION IS PUBLIC INFORMATION.

(3) THE ELIMINATION OF CIVIL, CRIMINAL, OR ADMINISTRATIVE PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR AN ADMINISTRATIVE TRIBUNAL BODY TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT, THAT WHEN TAKEN TOGETHER ARE SERIOUS, AND THAT WERE BECAUSE OF SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS WITHIN THE 3-YEAR PERIOD PRIOR TO THE DATE OF DISCLOSURE.

#### SECTION 2 (4)

(4) "Voluntarily disclosed violation" means a disclosure:

(a) of a violation, the knowledge of which arises ~~out~~ BECAUSE of an environmental self-evaluation;

(b) that is made promptly after the disclosing person or entity obtains knowledge of the violation;

(c) that is made to the agency that has regulatory authority with regard to the violation disclosed;

(d) in which the person or entity making the disclosure initiates action to resolve THE VIOLATION in a reasonably diligent manner AND CORRECTS THE VIOLATION ACCORDING TO THE COMPLIANCE PLAN APPROVED BY THE REGULATORY AGENCY SUBMITS TO THE APPROPRIATE REGULATORY AGENCY, IN WRITING, THE FOLLOWING INFORMATION:

(I) THE DATE OF THE SELF-EVALUATION THAT IDENTIFIED THE VIOLATIONS;

(II) A DESCRIPTION OF THE VIOLATION, INCLUDING ALL DATA PERTINENT TO THE DETERMINATION THAT A VIOLATION EXISTED;

(III) THE ACTION BEING UNDERTAKEN TO CORRECT THE VIOLATION;

(IV) AN ESTIMATED TIMETABLE FOR CORRECTING THE VIOLATION; AND

(V) A COMMITMENT TO DILIGENT RESOLUTION OF THE VIOLATION;

(e) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation AND RESOLUTION of the ~~issues~~ VIOLATIONS identified in the disclosure PURSUANT TO APPLICABLE ENVIRONMENTAL LAWS; and

(f) that is not otherwise required by law, PERMIT, ORDER, OR RULE to be reported to a regulatory authority.

#### PRIVILEGE ANALYSIS

##### LIMITED PROTECTION OF ENVIRONMENTAL AUDIT DOCUMENTS.

Again, the EQC staff did not develop a specific "discussion" document for this topic. We did search the Montana statutes for the terms "privilege, privacy, public records, secrecy, confidentiality, trade secrets," and others. We also did a cursory review of court decisions on these topics and obtained and reviewed other state legislation. What we found is set out below for your review and analysis.

#### Notations:

The term "privilege" in the context of Montana law is typically reserved for the protection of the privacy of an individual in communications with other individuals such as a physician, attorney, spouse, psychiatrist or clergyman. In the legal context of the Rules of Civil Procedure, matters which are "privileged" are not subject to discovery.

The term "trade secrets" in the context of Montana law is typically reserved for the protection of one's economic interests which would otherwise be damaged by the release of the information required to be provided to the government.

The term "confidential" in the context of Montana law is typically reserved for matters which are either individual privacy matters or considered to be trade secrets having economic value.

The Right to Know provisions of the Montana Constitution generally require government agencies to make available for review any public records in their possession except those concerning individual privacy. The term public records is defined and does not include "private writings." (Section 2-6-101 MCA.)

If certain business documents were determined to be private writings and not required to become public records, while they still may be subject to discovery through the Rules of Civil Procedure (unless privileged), they would not be subject to the Right to Know provisions of the Constitution because the documents are not public documents.

For example, the Minnesota Environmental Improvement Pilot Program (effective 6-95 to 7-1-99) states, in part:

#### **Section 15. ACCESS TO DOCUMENTS**

**Subdivision 1. "Public Access.** The state may not request, inspect or seize a final audit report, draft audit papers, a self-evaluation form, the notes or papers prepared by the auditor or the person conducting the self-evaluation in connection with the audit or self-evaluation, or the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation, other than the report required in section 10, subdivision 2, except in accordance with the agency's policy on environmental auditing as adopted by the agency on January 24, 1995.

**Subdivision 2. Third Party Access.** After receipt by the commissioner of a report that complies with section 10, subdivision 2, the final audit

report, draft audit reports, the self-evaluation form, any notes or papers prepared by the auditor or by the person conducting the self-evaluation in connection with the audit or self-evaluation, and the internal documents of a regulated entity establishing, coordinating, or responding to the audit or self-evaluation covered by the report **are privileged as to all persons other than the state** provided that the regulated entity is in compliance with its commitments under sections 10 and 12."

Section 10 defines the qualifications for participation in the program by submitting a report to the commissioner detailing the discovered violation and Section 12 describes the preparation of an acceptable compliance plan.

In its self audit law, Minnesota considers the violation discovery report and corrective action plan to be public documents. It has declared the audit reports, documents, notes, etc. to be internal private writings of no interest to and not obtainable by the state, with exception. The internal audit report and documents may be obtained in accordance with the pollution control agency's policy on self auditing.

Once the "protected" documents are acquired or kept by the state, the provisions of Subdivision 2 regarding third party access would likely be improper in Montana given the Constitutional and statutory language regarding public documents.

In legislation effective next July 1, 1996, the state of South Dakota simply states, in part, that:

"The department may not request results of an environmental audit. However, an environmental audit is subject to discovery according to the rules of civil or criminal procedure. If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation or permit enforced by the department may be summarized for the purpose of disclosure to the department secretary...."

#### Supporting information

### CONSTITUTION

Article II Section 9. **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II Section 10. **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

### PUBLIC RECORDS GENERALLY

2-6-101. Definitions. (1) Writings are of two kinds:

- (a) public; and
- (b) private.

(2) Public writings are:

- (a) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;
- (b) public records, kept in this state, of private writings, except as provided in 22-1-1103 and 22-3-807. (below)
- (3) Public writings are divided into four classes:
  - (a) laws;
  - (b) judicial records;
  - (c) other official documents;
  - (d) public records, kept in this state, of private writings.
- (4) All other writings are private."

22-6-102. Citizens entitled to inspect and copy public writings. (1) Every citizen has a right to inspect and take a copy of any public writings of this state, except as provided in 22-1-1103 or 22-3-807 **and as otherwise expressly provided by statute.**

(2) Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him on demand a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing."

(22-1-1103) non-disclosure of a person's library records.

(22-3-807) historical preservation office to keep burial site records confidential.

22-6-104 Records of officers open to public inspection. Except as provided in 40-8-126 and 27-18-111, the public records and other matters in the office of any officer are at all times during office hours open to the inspection of any person."

### UNIFORM TRADE SECRETS ACT

30-14-402. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:



(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

30-14-406. Preservation of secret. In an action under this part, **a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval."**

EXAMPLE:

#### Regulation of Utilities

##### Role of Commission

69-3-105. Access to commission records and reports -- protective order. (1) Except as provided in subsection (2), the reports, records, accounts, files, papers, and memoranda of every nature in the possession of the commission are open to the public at reasonable times, subject to the exception that when the commission considers it necessary, in the interest of the public, it may withhold from the public any facts or information in its possession for a period of not more than 90 days after the acquisition of the facts or information.

(2) The commission **may issue a protective order when necessary to preserve trade secrets, as defined in 30-14-402**, required to carry out its regulatory functions."

EXAMPLE:

#### Employee and Community Hazardous Chemical Information Act

**50-78-102. Definitions.** As used in this chapter, the following definitions apply:

(17) "Trade secret" means a confidential formula, pattern, process, device, or information, including chemical name or other unique chemical identifier, that is used in an employer's business and that gives the employer an opportunity to obtain an advantage over competitors.

### PRIVILEGE

EXAMPLES:

26-1-801. **Policy to protect confidentiality in certain relations.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part."

26-1-802. **Spousal privilege...**

26-1-803. **Attorney-client privilege.** (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

26-1-804. **Confessions made to member of clergy....**

26-1-805. **Doctor-patient privilege.** Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

26-1-806. **Speech-language pathologist, audiologist-client privilege....**

26-1-807. **Psychologist-client privilege.** The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client.

26-1-809. **Confidential communications by student to employee of educational institution.** A counselor, psychologist, nurse, or teacher employed by any educational institution...

26-1-810. **Confidential communications made to public officer.** A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure."

26-1-811. Mediator **privilege**. Except as otherwise provided by law, a person acting as a mediator in a family law mediation cannot, without the consent of the parties to the mediation, be examined in a civil action...

26-1-901. Short title. This part shall be known and may be cited as the "Media **Confidentiality Act**".

26-1-902. Extent of **privilege**. (1) Without his or its consent no person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment or its business.

(2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose or produce the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his or its business.

## **CONFIDENTIALITY**

### **EXAMPLES:**

82-4-306. **Confidentiality** of application information. (1) Except as provided in subsections (2) and (3), the information obtained by the department from applications for exploration licenses and the information obtained from small miners is confidential between the department and the applicant, except for the name of the applicant and the county of proposed operation. However, all activities conducted subsequent to exploration and other associated facilities are public information and must be conducted under an operating permit.

(2) Any information referenced in subsection (1) is properly admissible in any hearing conducted by the department or in any judicial proceeding to which the director and the applicant are parties and is **not confidential when a violation of this part or rules adopted under this part has been determined by the department or by judicial order.**

(3) The department may disclose information obtained by the department from exploration license applications and from small miners and that is related to the exploration or mining on state and federal lands when the information identifies the location of exploration and mining activities and describes the surface disturbance that is occurring or projected to occur. The department **may not disclose a licensee's or small miner's proprietary geological information.**

(4) Failure to comply with the secrecy provisions of this part is punishable by a fine of up to \$1,000."

77-3-308. Limitation on public inspection rights. The department (DEQ) may withhold from public inspection any information obtained from a coal mining lessee or permittee under this part if the information relates to the geology of the mining lease or permit. The withholding is effective for as long as the department considers it necessary either to **protect the lessee's or permittee's economic interest in the geologic information against unwarranted injury** or to protect the public's best interest."

80-8-107. Public information. Except as provided in Title 80, chapter 15, the department as it deems proper may, alone or in cooperation with other state or federal agencies, publish information regarding aspects of the use and application sections or registration sections of this chapter. This information **cannot disclose operations of selling, production, or use of pesticides by any person."**

80-10-210. Licensee reports -- **confidentiality** -- inspection -- failure to file. (1) Information contained in the reports required by 80-10-207(3) shall be held confidential by the department. Summary data published by the department shall be in a form that will not disclose details of any operation or business.

80-15-108. **Confidentiality**. (1) The department and the department of environmental quality shall maintain the confidentiality of data declared confidential by EPA and chemical registrant data and information protected from disclosure by federal or state law.

(2) The department of environmental quality shall comply with the requirements of 75-5-105 and the department shall comply with the requirements of 80-8-107 and 80-10-210, except as otherwise provided by this section."

## ATTACHMENT E (cont.)

### EPA POLICY ANALYSIS

Protection Afforded:	EPA POLICY
	Punitive penalty mitigation by the Department for voluntary disclosure and not recommend criminal prosecution or request audit to initiate civil or criminal investigation.
Environmental Audit Definition:	<p><b>Environmental Audit</b> means: a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.</p> <p><b>Environmental Audit Report</b> means: the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.</p>
Conditions for Penalty mitigation and/or immunity:	1. Voluntarily disclosure.
	2. Violation not knowingly or intentionally committed
	3. Disclosure of violation within 10 days.
	4. Violation discovered by regulated entity not someone else.
	5. Must correct violation within 60 days..unless Department determines that the additional time is needed.
	6. Prevent Violation from recurring.
	7. No pattern of past violations.
	8. Violation not serious and does not present an imminent or substantial harm.
	9. Regulated entity cooperated.
	10. Violation does not violate any judicial or administrative order.
	11. Due diligence required.

## ATTACHMENT F

INTRODUCED BY \_\_\_\_\_ BILL NO. \_\_\_\_\_

A BILL FOR AN ACT ENTITLED, An Act to provide for certain voluntary environmental audits.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Purpose.

NEW SECTION. Section 2. Definition.

(1) "Environmental audit" is a formal, written, voluntary, scheduled internal assessment, evaluation, or review, not required by law, rule, regulation, or permit, that is conducted by a regulated entity or its agent, and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, regulation, or permit enforced by the department.

(2) "Department" means the Department of Environmental Quality provided for in 2-15-3501, or Department of Agriculture provided for in 2-15-3001.

NEW SECTION.. Section 3. Immunity from imposition of civil or criminal penalties for violations found and disclosed.

(1) By completing an environmental audit in compliance with the terms and conditions of this Act, there shall be immunity from the imposition of civil or criminal penalties for violations found, disclosed and promptly corrected. Nothing in this section discourages uninterrupted or continuous auditing. An environmental audit may not be used to prevent the

department from carrying out its statutory or regulatory functions.

(2) The department may not pursue civil penalties or criminal prosecution for violations found during an environmental audit that are disclosed to the department in writing within thirty days after the violation is discovered. Violations found by the department prior to the time a regulated entity has disclosed these violations in writing to the department are not covered by the provisions of this Act. If a state program is required in writing by a federal agency to assess penalties for a violation as a condition to maintaining primacy over a federally-delegated program, or if violations caused imminent and substantial damage to human health or the environment, the provisions of this Act do not apply. If violations are found during an audit and disclosed in writing to the department, a written compliance schedule shall be negotiated between the department and the regulated entity to promptly correct violations disclosed, unless the violation has been resolved to the satisfaction of the department at the time of the disclosure. The regulated entity must take steps to prevent recurrence of the violation. The regulated entity must cooperate with the department and provide such information as is necessary for the department to determine the applicability of [this act].

NEW SECTION. Section 4. Use of information as a result of audit.

(1) The department may not request an environmental audit. However, an environmental audit is subject to discovery

according to the rules of civil or criminal procedure. Any information, however, contained in an environmental audit pertaining to violations that were discovered as a result of the audit and disclosed and corrected as required by this Act, shall not be used against the regulated entity in any administrative hearing or judicial action.

(2) If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation, or permit enforced by the department may be summarized for the purposes of disclosure to the department. The summary shall include the violation, type, location, date found or disclosed, if known, and the entity that conducted the environmental audit.

(3) Documents, communications, compliance data, reports, or other information required to be collected, developed, maintained, or reported to the department according to state law, rule, regulation, or permit are not covered by the provisions of this Act.

NEW SECTION. Section 5. Limitations on use of environmental audit.

(1) An environmental audit may not be used as a defense to a civil or criminal action if a regulated entity:

(a) Has willfully and with knowledge violated state or federal environmental law, rule, regulation, or permit;

(b) Has established a pattern of repeatedly violating environmental law, rule, regulation, permit, order, or compliance schedule within the three years prior to the date of

the disclosure at the same facility; or

(c) Has not corrected the violations according to the negotiated compliance schedule described in this Act.

# ATTACHMENT F

## **EPA POLICY / MODIFIED SOUTH DAKOTA BILL**

	<b>EPA POLICY</b>	<b>MODIFIED S.D. BILL</b>
<b>Protection Afforded:</b>	Punitive penalty mitigation by the Department for voluntary disclosure and not recommend criminal prosecution or request audit to initiate civil or criminal investigation.	Immunity from civil or criminal penalties for violations found, disclosed and properly corrected. The Department may not request the environmental audit but the audit is subject to discovery according to the rules of civil or criminal procedure. Audit information pertaining to violations discovered and corrected as a result of the environmental audit may not be used against a regulated entity in any administrative hearing or judicial action.
<b>Environmental Audit Definition:</b>	<p><b>Environmental Audit</b> means: a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.</p> <p><b>Environmental Audit Report</b> means: the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.</p>	<b>Environmental Audit</b> means: a formal, written, voluntary, scheduled internal assessment, evaluation or review, not required by law, rule, regulation, or permit, that is conducted by a regulated entity or its agent, and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, regulation, or permit enforced by the department.
<b>Conditions for Penalty mitigation and/or immunity:</b>	1. Voluntarily disclosure.	1. Environmental audit is voluntary.
	2. Violation not knowingly or intentionally committed	2. Environmental audit cannot be used as a defense to civil or criminal action if the regulated entity has willfully and with knowledge violated state or federal environmental law, rule, regulation, or permit.
	3. Disclosure of violation within 10 days	3. The department may not pursue civil penalties or criminal prosecution for violations found during an environmental audit within 30 days after the violation is discovered.
<b>Conditions for Penalty mitigation and/or immunity continued:</b>	4. Violation discovered by regulated entity not someone else.	4. Violations discovered prior to the time a regulated entity has disclosed these violation in writing to the department are not covered by this policy.
	5. Must correct violation within 60 days..unless Department determines that the additional time is needed	5. A written compliance schedule must be negotiated between the department and the regulated entity to promptly correct the violations disclosed. If the regulated entity has not corrected the violations according to the negotiated compliance schedule the environmental audit may not be used as a defense to a civil or criminal action.
	6. Prevent Violation from recurring.	6. The regulated entity must take steps to prevent recurrence of the violation.



	7. Violation must not have occurred previously within the last 3 years or be a part of a pattern of violations by the facility's parent organization within the last 5 years.	7. An environmental audit may not be used as a defense to a civil or criminal action if a regulated entity has established a pattern of repeatedly violating environmental law within 3 years prior to the date of the disclosure at the same facility.
	8. Violation did not result in any serious actual harm or present an imminent and substantial harm or violate the terms of any judicial or administrative order or consent agreement.	8. If violations caused imminent and substantial damage to human health or the environment this policy does not apply.
	9. Regulated entity cooperated.	9. The regulated entity must cooperate.
	10. Violation does not violate any judicial or administrative order.	10. Documents, communications, compliance data, reports, or other information required to be collected, developed, maintained, or reported to the department according to state law, rule, regulation, or permit are not covered by this policy.
	11. Due diligence required.	11. <u>No Due diligence requirements</u>
<b>Conditions for Penalty mitigation and/or immunity continued:</b>		12. An environmental audit may not be used to prevent the department from carrying out its statutory or regulatory functions.
		13. If a state program is required in writing by a federal agency to assess penalties for a violation as a condition to maintaining primacy over a federally-delegated program this policy does not apply.
		14. Nothing in this section [section 3 immunity from imposition of civil or criminal penalties for violations found and disclosed] discourages uninterrupted or continuous auditing.
<b>Use of Environmental Audit information:</b>		
	1. Department may not recommend criminal prosecution or request audit to initiate civil or criminal investigation.	1. Department may not request the environmental audit but the audit is subject to discovery according to the rules of civil or criminal procedure. Audit information pertaining to violations discovered and corrected as a result of the environmental audit may not be used against a regulated entity in any administrative hearing or judicial action.
		2. If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation, or permit enforced by the department may be summarized for the purposes of disclosure to the department. The summary must include: violation type, location, date found or disclosed if known and who conducted the audit.

A BILL FOR AN ACT ENTITLED, An Act to provide for certain voluntary environmental audits.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

New Section. Section 1. Purpose. The legislature finds that environmental protection and environmental quality will be enhanced by incentives to voluntarily identify and remedy violations of environmental laws and that the public will be benefited thereby. The legislature further finds that nothing in sections 2 through 4 are intended to inhibit or to be a substitute for the exercise of the regulatory authority by those agencies entrusted with protecting Montana's environment.

New Section. Section 2. Definition.

(1) "Environmental audit" is a formal, written, voluntary, scheduled internal assessment, evaluation, or review, not required by law, rule, regulation, or permit, that is conducted by a regulated entity or its agent, and initiated by the regulated entity for the purpose of determining compliance with environmental law, rule, regulation, or permit enforced by the department means a voluntary self-evaluation, not otherwise required by law or regulatory action, of a facility or operation regulated under environmental laws or of management systems related to the facility or operation, the primary purpose of which is to identify and prevent noncompliance on a long-term basis and to improve compliance with environmental laws. An environmental audit may be conducted by the owner or operator of the facility or operation, by a parent company of the owner or operator of the facility or operation, by an employee or agent of the owner, operator, or parent company, or by one or more independent contractors.

(2) "Environmental audit report" means a set of documents that are prepared as a result of an environmental audit. All documents that are part of an environmental audit report must contain the date or dates on which the environmental audit was conducted. An environmental audit report must:

(a) contain materials that were collected or developed for the primary purpose of and in the course of conducting an environmental audit and that may include, but are not limited to, field notes and records of observations, findings, opinion, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys;

\_\_\_\_\_ (b) state the scope of the environmental audit, the information obtained, and conclusions and recommendations with a reference to supporting data or supporting information that is to be generated or that has already been generated for the purpose of the report;

\_\_\_\_\_ (c) identify proposed actions to resolve identified violations in accordance with applicable environmental laws; and

\_\_\_\_\_ (d) indicate identified violations that have been resolved or indicate that a plan has been implemented to resolve the violations in accordance with applicable environmental laws.

(23) "Environmental law" means a state law, administrative rule, permit condition, or license designed to protect, enhance, or restore the environment or natural resources in the environment.

\_\_\_\_\_ (4) "Department" means "Department" means the Department of Environmental Quality provided for in 2-15-3501, or Department of Agriculture provided for in 2-15-3001, any state regulatory agency responsible for the enforcement of Environmental laws.

\_\_\_\_\_ (5) "Voluntarily disclosed violation" means a disclosure:

\_\_\_\_\_ (a) of a violation, the knowledge of which arises because of an environmental audit;

\_\_\_\_\_ (b) that is made within 10 business days after the disclosing person or entity knows that a violation has occurred;

\_\_\_\_\_ (c) that is made to the department has regulatory authority with regard to the violation disclosed;

\_\_\_\_\_ (d) in which the person or entity making the disclosure initiates action to resolve the violation in a diligent manner and submits to the appropriate department, in writing at the time of the disclosure, the following information:

\_\_\_\_\_ (i) the date of the environmental audit which gave rise to knowledge of the violation;

\_\_\_\_\_ (ii) a description of the violation, including all supporting data pertinent to the determination that a violation existed;

\_\_\_\_\_ (iii) the action being undertaken to correct the violation;

\_\_\_\_\_ (iv) an estimated timetable for correcting the violation; and

\_\_\_\_\_ (v) a commitment to diligent resolution of the violation.

All information submitted to a department regarding a voluntarily disclosed violation is public information.

(e) in which the person or entity making the disclosure cooperates with the appropriate agency in connection with investigation and resolution of disclosed violations pursuant to applicable environmental law including providing to the regulatory agency any additional information reasonably requested by the agency to the agency to determine (i) the facts and circumstances surrounding the disclosed violation and (ii) the appropriate remediation that may be required to resolve a violation; and

(f) that is not otherwise required by law, permit, order, or rule to be reported to a regulatory authority

NEW SECTION. Section 3. Immunity from Imposition of civil or criminal penalties for violations found and disclosed: voluntarily disclosed violations.

(1) By completing an environmental audit in compliance with the terms and conditions of this Act, a regulated entity shall be immunity from the imposition of civil or criminal penalties for violations found, disclosed and promptly corrected. Nothing in this section discourages uninterrupted or continuous auditing. An environmental audit shall not be used to prevent the department from carrying out its statutory or regulatory functions.

(2) Except for a violation of Title 82, Chapter 4, Part 1 or 2, the department may not pursue civil or administrative penalties or criminal prosecution against a person or entity for voluntarily disclosed violations unless:

(a) for violations found during an environmental audit that are disclosed to the department in writing within thirty days after the violation is discovered. Violations found by the department prior to the time the regulated entity has disclosed these violations in writing to the department are not covered by the provisions of this Act. If a state program is required in writing by a federal agency to assess penalties for a violation as a condition of maintaining primacy over a federally delegated program prior to the date of the environmental audit through

which the person or entity discovered the violation;

(i) an investigation or an administrative or judicial proceeding regarding the specific voluntarily disclosed violation is underway or imminent; or

(ii) the person or entity had been provided written notification that an investigation regarding the specific disclosed violation had been initiated;

(b) the violation resulted in or if violations caused imminent and substantial damage to human health or the environment, the provisions of this Act do not apply serious actual harm or a clear, substantial and imminent threat of actual harm to human health or to the environment;

(c) action to correct the violation do not meet the requirement of Section 2(5)(d-e) If violations are found during an audit and disclosed in writing to the department, a written compliance schedule shall be negotiated between the department and the regulated entity to promptly correct violations disclosed, unless the violation has been resolved to the satisfaction of the department at the time of disclosure. The regulated entity must take steps to prevent recurrence of the violation. The regulated entity must cooperate with the department and provide such information as is necessary for the department to determine the applicability of [this act]

(d) the entity or person making the disclosure purposely or knowingly committed the violation;

(e) the entity or person making the disclosure has disclosed the same violation for the same

facility to the department within the previous three years.-

NEW SECTION. Section 4. Use of information as a result of audit. Submission and use of environmental audit information.

(1) the department may not request an environmental audit. However, an environmental audit is subject to discovery according to the rules of civil or criminal procedure. Any information, however, contained in an environmental audit pertaining to violations that were discovered as a result of the audit and disclosed and corrected as required by this Act, shall not be used against the regulated entity in any administrative hearing or judicial action. The department may not make routine requests that an entity submit environmental audit reports to the department.

(2) Should the department determine that it must review an environmental audit report to verify information submitted with a voluntarily disclosed violation or to verify that the person or entity discovered the violation during an environmental audit, then (i) the department may review the environmental audit report at the person's entity's offices or (ii) the department may request that the person or entity meet with the department at its offices for the purpose of reviewing the environmental audit report. However, the department may not make copies of any portions of the environmental audit report or require that the person or entity provide a copy of the environmental audit report to the department. If, after reviewing the environmental audit report, the department determines that the disclosed violation does not definition of a voluntarily disclosed violation or that it was not discovered during an environmental audit, then the department may proceed as if the disclosed violation were not a voluntarily disclosed violation and the entity may assert any legal theories or defenses available to it should the department request the environmental audit report or any portion thereof.

(3) Except as provided in Section 4(2) with regard to a specific disclosed violation, the department may not use any information or violations about which it learns through its review of an environmental audit report as the basis for administrative, civil, or criminal actions unless the department determines that the violation is not being addressed as required by applicable environmental laws.

~~(2) If a regulated entity discloses a violation found during an environmental audit, the section of the environmental audit report pertaining to a violation of environmental law, rule, regulation, or permit enforced by the department may be summarized for the purposes of disclosure to the department. The summary shall include the violation, type, location, date found or disclosed, if known, and the entity that conducted the environmental audit.~~

(34) Documents, communications, compliance data, reports, or other information required to be collected, developed, maintained, or reported to the department according to state law, rule, regulation, order, or permit are not covered by the provisions of this Act.

~~(5) Nothing in this Act is intended to limit discovery of environmental audit reports in civil actions for alleged damage to real property or tangible personal property or for alleged personal injury provided that the causes of action asserted are not for alleged violations of environmental laws that qualify for the limited immunity provided by this Act.~~

~~NEW SECTION. Section 5. Limitations on use of environmental audit.~~

~~(1) an environmental audit may not be used as a defense to a civil or criminal action if a regulated entity~~

~~(a) Has willfully and with knowledge violated state or federal environmental law, rule, regulation, or permit;~~

~~(b) Has established a pattern of repeatedly violating environmental law, rule, regulation, permit, order, or compliance schedule within the three years prior to the date of the disclosure at the same facility; or~~

~~(c) Has not corrected the violations according to the negotiated compliance schedule described in this~~

## ATTACHMENT H

### ENVIRONMENTAL SELF AUDIT WORKING GROUP RESULTS AND FINDINGS

November 1996

The Environmental Self Audit Working Group process was not intended to develop a consensus document or policy, but to analyze the confidentiality and immunity issues raised in the debate over HB 412 during the 1995 Legislature.

#### A. Findings and areas of "agreement"

- 1) Voluntary environmental self audits should be encouraged.
  - a) regulatory inspection agencies need cooperation from businesses.
  - b) earlier detection can prevent pollution.
  - c) it is a proactive business effort on its own behalf for public benefit.
- 2) As an incentive, penalties should be negotiated, reduced, and/or eliminated (with exceptions) for those violations discovered as the result of environmental audits and which are reported and promptly corrected.

#### B. Issues of contention

- 1) Whether an environmental self audit policy should be accomplished by statute or by administrative policy.
  - a) if by statute, whether or not a sunset provision is needed.
  - b) if by policy, whether or not the December 1995 federal EPA self audit policy is sufficient.
- 2) Total immunity or partial immunity as incentives to self audit.
  - a) whether or not civil, administrative, and criminal penalty immunity is required
  - b) whether or not identifiable economic benefits gained by non-compliance should be waived.
  - c) whether or not criminal penalties should be waived, or should be waived except for what specific circumstances.
- 3) Privilege of audit information as an incentive to self audit.
  - a) whether or not audit information should be retained by the facility, made available to the agency only or made available to the agency and the public.
  - b) under what circumstances could information be withheld.

#### ELEMENTS OF AN ENVIRONMENTAL SELF AUDIT POLICY

With varying degrees of support from the members of the working group, staff has identified the following elements which need to be addressed in any such public policy.

- 1) Environmental audits should not be used fraudulently as shields from prosecution. (Bad actor clause)

- 2) Audit policy should not jeopardize state primacy relationships with the federal government for delegated federal programs. Language considered to be a “statutory bar to enforcement” may be problematic for federally delegated programs.
- 3) Audit information should/should not be subject to routine information requests by regulatory agencies.
- 4) Reported violations should be corrected/remediated to the satisfaction of the regulatory agency and verification should be possible. Timeliness is an issue.
- 5) Reported violations which result in (your defined adjective here) damage to human health or the environment should not subject to the policy.
- 6) Policy should not prevent third party litigation to recover damages to person or property caused by violations of law.
- 7) Impact of policy should be measurable.
- 8) Definitions of audit and audit report must be clear and concise.



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## HOUSE JOINT RESOLUTION NO. 10

INTRODUCED BY KNOX, HERTEL, COCCHIARELLA, ORR, DOHERTY, WELDON, GROSFIELD, RYAN  
BY REQUEST OF THE ENVIRONMENTAL QUALITY COUNCIL

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THAT THE ENVIRONMENTAL QUALITY COUNCIL CONDUCT AN INTERIM STUDY OF THE COMPLIANCE AND ENFORCEMENT PROGRAMS OF THE STATE'S NATURAL RESOURCE AND ENVIRONMENTAL AGENCIES.

WHEREAS, timely, appropriate, equitable, and efficient application of enforcement and compliance measures is essential to protect public health and the quality of Montana's natural resources; and

WHEREAS, the people and the regulated community of the state of Montana demand that the laws of this state be enforced in a consistent, fair, and effective manner; and

WHEREAS, limited state financial resources necessitate a revaluation and potentially a reprioritization of the goals and implementation strategies of Montana's natural resource and environmental laws; and

WHEREAS, the Environmental Quality Council has longstanding involvement and strong bipartisan expertise in the legislative oversight of state natural resource and environmental programs and their implementation and has been a forum for resolving contentious natural resource and environmental issues.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That the Environmental Quality Council be requested to give priority to the study of the

compliance and enforcement programs of the state's natural resource and environmental agencies.

(2) That the study include but not be limited to a review and analysis of:

(a) the state's existing enforcement and compliance framework and how it is implemented;

(b) the constitutional and statutory goals of the various state natural resource and environmental agencies, whether these goals are consistent and appropriate, and whether these goals are being met;

(c) the proper balance among sanctions, incentives, technical assistance, education, and other enforcement tools in an effective and efficient enforcement program; and

(d) other states' natural resource and environmental agencies' attempts to improve and measure compliance and enforcement.

(3) That the Environmental Quality Council consult with federal, state, and local officials, the regulated community, citizens, and other persons or groups with expertise or interest in the compliance and enforcement programs of the state's natural resource and environmental agencies.

(4) That the Environmental Quality Council vigorously pursue alternative funding sources to conduct this study.

(5) That the Environmental Quality Council report its findings and recommendations to the 55th Legislature.

-END-

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### Constitutional and Statutory Goals

The following information summarizes the relevant constitutional and statutory goals regarding general environmental protection in Montana. The information provided is broad, and includes not only directives to protect the environment, but also directives that may assist in discussing and defining appropriate "limits" to protection (e.g. property rights and public rights).

#### Montana Constitution

##### - Preamble

"We the people . . . grateful . . . for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations . . ."

##### - Article II

###### - section 3

"All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, . . . acquiring, possessing and protecting property, and seeking their safety, health, and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities."

Related Guidance: Section 3 of the constitutional transition schedule notes that rights added in the 1972 constitutional revision (e.g. right to a clean and healthful environment) are not retroactive.)

###### - section 8

"The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

###### - section 17

"No person shall be deprived of life, liberty, or property without due process of law."

###### - section 29

"Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner . . ."

###### - section 34

"The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

## **Article IX**

### **- section 1**

"(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

### **-section 2**

"(1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed."

### **- section 3**

"(1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water . . . appropriated for . . . beneficial use, the right of way over the lands of others for [improvements] necessarily used in connection therewith, and the sites for reservoirs . . . shall be held to be a public use.

(3) All . . . waters . . . are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

### **- section 4**

"The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archaeologic, scientific, cultural, and recreational areas, sites, records and objects, and for their use and enjoyment by the people."

## **Article X**

### **- section 1**

"(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

## **Article XII**

### **- section 1**

"(1) The legislature shall provide for a Department of Agriculture and enact laws and provide appropriations to protect, enhance, and develop all agriculture."

## **Montana Code Annotated (MCA)**

## **Streams**

### **23-2-302, MCA**

From the uses and limitations specified in this section, the intent appears to be to provide

for public use of most river surface waters, to set limitations on that use, to protect other waters from public use, protect big game from being hunted from the water (except when authorized), and to protect property owners from encroachment.

**Responsible Agency: Department of Fish Wildlife and Parks**

**Cesspool, Septic Tanks, etc.**

**37-41-1, MCA**

It is assumed the purpose of this part is to protect public health.

**Responsible Agency: Department of Environmental Quality**

**Water Treatment Plants**

**37-42-101, MCA**

"It is declared that the health and welfare of Montana citizens are jeopardized by persons not properly qualified to operate the water supply systems and that Montana's state waters are endangered by persons not properly qualified to operate the wastewater treatment plants."

**Responsible Agency: Department of Environmental Quality**

**Water Well Contractors**

**37-43-101, MCA**

"It is the purpose of this chapter to reduce and minimize the waste and contamination of ground water resources within this state by reasonable regulation and licensing of drillers or makers of water wells and monitoring wells and to protect the health and general welfare by providing a means for the development of the natural resource of underground water in an orderly, sanitary, and reasonable manner."

**Responsible Agency: Department of Natural Resources and Conservation (Board of Water Well Contractors)**

**Environmental Protection**

**75-1-102, MCA**

"The purpose . . . is to declare a state policy which will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

**75-1-103, MCA**

"(I) The legislature . . . declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of

undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

- (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
  - (b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
  - © attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
  - (d) protect the right to use and enjoy private property free of undue government regulation;
  - (e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;
  - (f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and
  - (g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
- (3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

#### **75-1-201, MCA**

"(1) The legislature authorizes and directs that, to the fullest extent possible:

- (a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;
- (b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:
  - (I) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;
  - (ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;
  - (iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);
  - (iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:
    - (A) the environmental impact of the proposed action;
    - (B) any adverse environmental effects that cannot be avoided if the proposal is implemented;
- © alternatives to the proposed action;



(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101; and

© prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes. . . ."

**Responsible Agencies: Any Agency that conducts actions pursuant to the Montana Environmental Policy Act (MEPA).**

**75-1-324, MCA**

"The environmental quality council shall:

- (1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret the information for the purpose of determining whether the conditions and trends are interfering or are likely to interfere with the achievement of the policy set forth in 75-1-103, and compile and submit to the governor and the legislature studies relating to the conditions and trends;
- (2) review and appraise the various programs and activities of the state agencies, in the light of the policy set forth in 75-1-103, for the purpose of determining the extent to which the programs and activities are contributing to the achievement of the policy and

make recommendations to the governor and the legislature with respect to the policy;

- (3) develop and recommend to the governor and the legislature state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;
- (4) conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
- (5) document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
- (6) make and furnish studies, reports on studies, and recommendations with respect to matters of policy and legislation as the legislature requests;
- (7) analyze legislative proposals in clearly environmental areas and in other fields where legislation might have environmental consequences and assist in preparation of reports for use by legislative committees, administrative agencies, and the public;
- (8) consult with and assist legislators who are preparing environmental legislation to clarify any deficiencies or potential conflicts with an overall ecologic plan; and
- (9) review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among the activities and with a general ecologic perspective, and suggest legislation to remedy the situations."

**Responsible Agency: Environmental Quality Council**

#### **75-1-1101, MCA**

This section sets up the state environmental contingency account, controlled by the governor, to (a) support renewable resource development under certain circumstances, and (b) to preserve renewable resources under certain emergency circumstances.

**Responsible Agency: Governor's Office**

### **Air Quality**

#### **75-2-102, MCA**

"(1) It is hereby declared to be the public policy of this state and the purpose of this chapter to achieve and maintain such levels of air quality as will protect human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state.

(2) It is also declared that local and regional air pollution control programs are to be supported to the extent practicable as essential instruments for the securing and maintenance of appropriate levels of air quality.

(3) To these ends it is the purpose of this chapter to:

- (a) provide for a coordinated statewide program of air pollution prevention, abatement, and control;

- (b) provide for an appropriate distribution of responsibilities among the state and local units of government;
- © facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions; and
- (d) provide a framework within which all values may be balanced in the public interest."

**Responsible Agency: Department of Environmental Quality**

#### **Asbestos**

##### **75-2-501, MCA et seq.**

Although not specifically stated, staff assumes the certification program described in this part is to protect public health and safety.

**Responsible Agency: Department of Environmental Quality**

#### **Nuclear Regulation**

##### **75-3-101, MCA**

"It is the policy of the state of Montana, in furtherance of its responsibility to protect the public health and safety, to:

- (1) institute and maintain a regulatory program for sources of ionizing radiation so as to provide, for compatibility with the standards and regulatory programs of the federal government, a single effective system of regulation within the state and a system consistent insofar as possible with those of other states; and
- (2) institute and maintain a program to permit development and utilization of sources of ionizing radiation for peaceful purposes consistent with the health and safety of the public."

##### **75-3-102, MCA**

"It is the purpose of this chapter to provide a program:

- (1) of effective regulation of sources of ionizing radiation for the protection of the occupational and public health and safety;
- (2) to promote an orderly regulatory pattern within the state, among the states, and between the federal government and the state and facilitate intergovernmental cooperation with respect to use and regulation of sources of ionizing radiation to the end that duplication of regulation may be minimized;
- (3) to establish procedures for assumption and performance of certain regulatory responsibilities with respect to byproduct, source, and special nuclear materials; and
- (4) to permit maximum utilization of sources of ionizing radiation consistent with the health and safety of the public."

**Responsible Agency: Department of Environmental Quality**

## **Water Quality**

### **75-5-101, MCA**

"It is the public policy of this state to:

- (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses;
- (2) provide a comprehensive program for the prevention, abatement, and control of water pollution."

### **75-5-102, MCA**

"(1) A purpose of this chapter is to provide additional and cumulative remedies to prevent, abate, and control the pollution of state waters.

- (2) This chapter does not abridge or alter rights of action or remedies in equity or under the common law or statutory law, criminal or civil, nor does this chapter or an act done under it estop the state or a municipality or person, as owner of water rights or otherwise, in the exercise of his rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution."

**Responsible Agency: Department of Environmental Quality**

## **Public Water Supply**

### **75-6-101, MCA**

"It is the public policy of this state to protect, maintain, and improve the quality and potability of water for public water supplies and domestic uses."

**Responsible Agency: Department of Environmental Quality**

## **Solid Waste**

### **75-10-101, MCA**

"The purpose of this part is to encourage the good management of solid waste and the conservation of natural resources through the promotion or development of systems to collect, separate, reclaim, recycle, and dispose of solid waste for energy production purposes where economically feasible and to provide a coordinated state solid waste and resource recovery plan."

### **75-10-102, MCA**

"(1) To implement this part, the following are declared to be public policies of this state:

- (a) Maximum recycling from solid waste is necessary to protect the public health, welfare, and quality of the natural environment.
- (b) Solid waste management systems shall be developed, financed, planned, designed, constructed, and operated for the benefit of the people of this state.
- © Private industry is to be utilized to the maximum extent possible in planning, designing, managing, constructing, operating, manufacturing, and marketing functions

related to solid waste management systems.

(d) Local governments shall retain primary responsibility for adequate solid waste management with the state preserving those functions necessary to assure effective solid waste management systems throughout the state.

(e) Costs for the management and regulation of solid waste management systems should be charged to those persons generating solid waste in order to encourage the reduction of the solid waste stream.

(f) Encouragement and support be given to individuals and municipalities to separate solid waste at its source in order to maximize the value of such wastes for reuse.

(g) The state shall provide technical advisory assistance to local governments and other affected persons in the planning, developing, financing, and implementation of solid waste management systems.

(h) Actions and activities performed or carried out by persons and their contractors in accordance with this part shall be in conformity with the state solid waste plan.

(I) When licensing a solid waste management system, the department shall consult with units of local government that have jurisdiction over the area encompassing the proposed system. . . ."

#### **Responsible Agency: Department of Environmental Quality**

#### **Hazardous Waste**

##### **75-10-402, MCA**

"(1) The legislature finds that the safe and proper management of hazardous wastes and used oil, the permitting of hazardous waste facilities, and the siting of facilities are matters for statewide regulation and are environmental issues that should properly be addressed and controlled by the state rather than by the federal government.

(2) It is the purpose of this part and it is the policy of this state to protect the public health and safety, the health of living organisms, and the environment from the effects of the improper, inadequate, or unsound management of hazardous wastes and used oil; to establish a program of regulation over used oil and the generation, storage, transportation, treatment, and disposal of hazardous wastes; to assure the safe and adequate management of hazardous wastes and used oil within this state; and to authorize the department to adopt, administer, and enforce a hazardous waste program pursuant to the federal Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 - 6987), as amended.

(3) The legislature also finds that petroleum products and hazardous substances stored in underground tanks are a separate category of substances that are regulated under the federal Resource Conservation and Recovery Act of 1976, as amended, and must be addressed and controlled properly by the state under the Montana Hazardous Waste and Underground Storage Tank Act.

It is the purpose of this part to authorize the department to establish, administer, and enforce an underground storage tank leak prevention program for these regulated substances. The department may use the authority provided in 75-10-413 through 75-10-417 and other appropriate authority provided by law to remedy violations of underground

storage tank requirements established under this part."

### **Underground Storage Tanks**

#### **75-10-409, MCA**

The purpose of this program relates to the purposes of the hazardous waste program noted above. Staff assumes the purposes include protection of ground water quality.

**Responsible Agency: Department of Environmental Quality**

### **Motor Vehicle Recycling and Disposal**

#### **75-10-5, MCA**

Staff assumes the purposes for this part relate to preserving the beauty of the state (preamble to the constitution) and the public's right to a clean and healthful environment (Article II, sec. 3, state constitution). See also the section on **Junkyards**, page 13.

**Responsible Agency: Department of Environmental Quality**

### **Hazardous Waste Disposal**

#### **75-10-601, MCA**

"The legislature finds that the existence of hazardous substances and contaminants in the environment and hazardous waste disposal sites poses a significant health hazard through potential and actual contamination of the environment. This part is therefore enacted to protect the public health, safety, and welfare through cooperation with the federal government under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to provide for the disposal and control of such hazardous substances and contaminants in a safe and environmentally sound manner."

**Responsible Agency: Department of Environmental Quality**

### **Megalandfill Siting**

#### **75-10-902, MCA**

"(1) It is the constitutionally declared policy of this state to maintain and improve a clean and healthful environment for present and future generations, to protect the environment from degradation and prevent unreasonable depletion and degradation of natural resources, and to provide for administration and enforcement to attain these objectives.

(2) The construction of solid waste facilities that dispose of over 200,000 tons of waste a year (megalandfills) may be necessary to meet increasing state and national needs for solid waste disposal capacity. However, due to the volume of waste processed, megalandfills may adversely affect the environment, surrounding communities, and the welfare of the citizens of this state.

Therefore, it is necessary to ensure that the location, construction, and operation of megalandfills will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a megalandfill may not be constructed or operated

within this state without a certificate of site acceptability pursuant to 75-10-916 and a license to operate acquired pursuant to 75-10-221 and 75-10-933."

**Responsible Agency: Department of Environmental Quality**

#### **Junkyards**

##### **75-15-201, MCA**

The intent of this section is described as ". . . for the purposes of promoting the public safety, health, and welfare and the convenience and enjoyment of public travel, to protect the public investment in public highways, and to preserve and enhance the scenic beauty of lands bordering public highways . . . ."

**Responsible Agency: Department of Environmental Quality**

#### **Energy -- Major Facilities**

##### **75-20-102, MCA**

This section repeats the constitutional requirement to "maintain and improve a clean and healthful environment for present and future generations, to protect the environmental life-support system from degradation and prevent unreasonable depletion and degradation of natural resources, and to provide for administration and enforcement to attain these objectives." It goes on to state that "the construction of additional power or energy conversion facilities may be necessary to meet the increasing need for electricity, energy, and other products . . . . Therefore, it is necessary to ensure that the location, construction, and operation of power and energy conversion facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a power or energy conversion facility may not be constructed or operated within this state without a certificate of environmental compatibility and public need acquired pursuant to this chapter."

**Responsible Agency: Department of Environmental Quality**

#### **Local Subdivision Regulation**

##### **76-3-102, MCA**

"It is the purpose of this chapter to:

- (1) promote the public health, safety, and general welfare by regulating the subdivision of land;
- (2) prevent overcrowding of land;
- (3) lessen congestion in the streets and highways;
- (4) provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements;
- (5) require development in harmony with the natural environment;
- (6) protect the rights of property owners; and
- (7) require uniform monumentation of land subdivisions and transferring interests in real

property by reference to a plat or certificate of survey."

**Responsible Jurisdiction: Local Government**

**State Subdivision Regulation**

**76-4-101, MCA**

"It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation, and wildlife."

Related Guidance: For this part, "subdivisions" are "parcels of less than 20 acres which have been created by a division of land . . . ." Other provisions in this chapter relate to the regulation of out of state subdivision sales for the prevention of consumer fraud.

**Responsible Agency: Department of Environmental Quality**

**Forestry**

**76-13-101, MCA**

"(1) It is the purpose . . . to provide for the protection and conservation of forest resources, range, and water; the regulation of streamflow; and the prevention of soil erosion. It is further the purpose . . . to more adequately promote and facilitate the cooperation, financial and otherwise, between the state and public and private agencies which are associated in such work.

(2) To achieve the conservation of forest and watershed resources, the legislature encourages the use of best management practices in timber sale planning, associated road construction and reconstruction, timber harvesting, site preparation, and related activities and establishes a process to ensure that information on best management practices is provided to owners and operators engaged in forest practices on private land."

**Responsible Agency: Department of Natural Resources and Conservation**

**Control of Forest Diseases and Insect Pests**

**76-13-301, MCA**

"It is the public policy of the state to protect and preserve forest resources from destruction by forest insect pests and tree diseases, to protect the forests and watersheds of Montana, to enhance the production of forests, to promote the stability of forest industry, to protect the recreational values of the forest, and to independently and through cooperation with the federal government and private forest landowners adopt measures to control, suppress, and eradicate outbreaks of forest insect pests and tree diseases."



Related Guidance: Section 76-13-102 defines "conservation" as "the protection and wise use of forest, forest range, forest water, and forest soil resources in keeping with the common welfare of the people of this state."

**Responsible Agency: Department of Natural Resources and Conservation**

**Control of Timber Slash and Debris**

**76-13-402, MCA**

This section includes fire hazard reduction as a component of "progressive forest practices."

**Responsible Agency: Department of Natural Resources and Conservation**

**Timber Slash and Debris**

**76-13-402, MCA**

Fire hazard reduction is the purpose of this program. Compliance can consist of "taking protective measures to minimize loss without abating the hazard."

**Responsible Agency: Department of Natural Resources and Conservation**

**Portable Sawmills**

**76-13-507, MCA**

It appears a primary intent of this part is also the reduction of fire hazard.

**Responsible Agency: Department of Natural Resources and Conservation**

**Timber Best Management Practices**

**76-13-131 through 76-13-135, MCA**

The purpose for this program appears to be the intent noted under 76-13-101 on page 14.

**Responsible Agency: Department of Natural Resources and Conservation**

**Conservation Districts**

**76-15-102, MCA**

"It is hereby declared to be the policy of the legislature to provide for the conservation of soil and soil resources of this state, for the control and prevention of soil erosion, for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water . . ."

Related Guidance: Section 76-15-102 notes the benefits of such conservation to be: ". . . to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state."

**Responsible Agency: Department of Natural Resources and Conservation**

**Grazing Districts**

**76-16-102, MCA**

"The purpose of this chapter is to provide for the conservation, protection, restoration, and proper utilization of grass, forage, and range resources of the state of Montana, to provide for the incorporation of cooperative nonprofit grazing districts, to provide a means of cooperation with . . . any other governmental agency or department having jurisdiction . . . , to permit the setting up of a form of grazing administration which will aid in the unification or control of all grazing lands within the state where the ownership is diverse and the lands intermingled, and to provide for the stabilization of the livestock industry and the protection of dependent commensurate ranch properties as defined herein."

Related Guidance: Section 75-16-104 states, "The department shall assist in carrying out the purposes of this chapter, act in an advisory capacity with the boards of County commissioners, and supervise and coordinate the formation and operation of districts that may be incorporated under this chapter."

**Responsible Agency: Department of Natural Resources and Conservation**

**State Lands**

**77-5-101, MCA**

State forest lands are for the purposes of production (growing and harvesting timber) and/or watershed protection.

Related Guidance: Title 77, Chapter 5 deals with timber management on state land. Section 77-5-206 requires the department to "supervise the management of timber before it is cut and secure the most complete utilization of all forest products consistent with the current forest management practices . . . ." Section 77-5-206 discusses the salvage timber program that provides for the "timely . . . logging of dead or dying timber or timber that is threatened by insects, disease, fire, or windthrow . . . ."

**Responsible Agency: Department of Natural Resources and Conservation**

**Streamside Management Zone**

**77-5-301, MCA**

- "(1) The legislature finds that the streamside management zone:
- (a) acts as an effective sediment filter to maintain water quality;
  - (b) provides shade to regulate stream temperature;
  - © supports diverse and productive aquatic and terrestrial riparian habitats;
  - (d) protects the stream channel and banks;
  - (e) provides large, woody debris that is eventually recruited into a stream to maintain riffles, pools, and other elements of channel structure; and
  - (f) promotes floodplain stability.
- (2) The legislature further finds that maintaining the integrity of forest streams is crucial

to the quality and quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use.

(3) The legislature further finds that forest streams are highly susceptible to impacts from land development and that in many cases forest practices in streamside zones in Montana are causing excessive and unnecessary damage to the banks, beds, and protective vegetation of forest streams.

(4) The legislature further finds that, through careful management in the streamside zone, owners and operators can achieve timber harvest goals without sacrificing water quality or impairing the beneficial uses of the water.

(5) The purposes of this part are:

(a) to protect the legitimate public interest in the quality and quantity of forest waters;

(b) to provide for standards, oversight, rehabilitation, and penalties to ensure that forest practices are conducted in a manner that conserves the integrity of Montana's streamside zones;

© to provide guidelines for the management of wildlife habitat in streamside zones; and

(d) to allow operators necessary flexibility to use practices appropriate to site-specific conditions in the streamside management zone."

**Responsible Agency: Department of Natural Resources and Conservation**

### **Fertilizer Registration and Pesticide Regulation (Agricultural Chemicals)**

#### **80-8-103, MCA**

The control of pesticides and their use is essential for the protection of man and his environment. Pesticides are currently considered valuable and necessary to provide sufficient quantity of quality foods and for the protection of humans from vector borne diseases. However, the protection of man and his essential needs--water, air, food, animals, vegetation, pollinating insects, and shelter from pesticides which are potentially dangerous--is in the public interest now and in the future. Therefore, it is deemed necessary to provide for the control of pesticides.

**Responsible Agency: Department of Agriculture**

### **Agricultural Chemical Ground Water Protection**

#### **80-15-103, MCA**

"It is the public policy of this state to:

(1) protect ground water and the environment from impairment or degradation due to the use of agricultural chemicals;

(2) allow for the proper and correct use of agricultural chemicals;

(3) provide for the management of agricultural chemicals to prevent, minimize, and mitigate their presence in ground water; and

(4) provide for education and training of agricultural chemical applicators and the general public on ground water protection, agricultural chemical use, and the use of alternative agricultural methods."

Related Guidance: Other purposes likely include protecting the safety and welfare of applicators,

adjacent owners, and general public.

**Responsible Agency: Department of Agriculture**

**Mining**

**Geophysical Exploration**

**82-1-101, MCA et seq.**

Staff assumes the purposes of this part include to conserve the structure and function of underground formations and to ensure the reclamation of surface lands. Rules of the board of oil and gas conservation must cover; adequate identification of seismic operating crews, designating areas where seismic exploration may be prohibited, and regulating the plugging and abandonment of seismic shot holes. The purpose of plugging shot holes is to contain any water within its native strata.

Related Guidance: Other sections in this chapter deal with False Mining Claims; Prospecting - Landowner Notification; Assaying of Ore; Smelters and Ore Shippers; and Coal Invoices.

**Responsible Agency: Department of Environmental Quality**

**Strip and Underground Mining**

**82-4-102, MCA**

"It is the policy of this state to provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; . . . to satisfy the requirement of Article IX, section 2, of the constitution of this state, that all lands disturbed by the taking of natural resources be reclaimed; and . . . to insure that adequate information is available on areas proposed for strip mining or underground mining so that mining and reclamation plans may be properly formulated to accommodate areas that are suitable for strip mining or underground mining. . . . This part is deemed to be an exercise of the general police power to provide for the health and welfare of the people."

**Responsible Agency: Department of Environmental Quality**

**Coal and Uranium Mine Reclamation**

**82-4-202, MCA**

This section reiterates and expands upon constitutional and other goals related to environmental protection:

- "(a) maintain and improve the state's clean and healthful environment for present and future generations;
- (b) protect its environmental life-support system from degradation;
- © prevent unreasonable degradation of its natural resources;
- (d) restore, enhance, and preserve its scenic, historic, archaeologic, scientific, cultural, and recreational sites;
- (e) demand effective reclamation of all lands disturbed by the taking of natural resources and maintain state administration of the reclamation program;
- (f) require the legislature to provide for proper administration and enforcement, create

adequate remedies, and set effective requirements and standards (especially as to reclamation of disturbed lands) in order to achieve the aforementioned objectives; and (g) provide for the orderly development of coal resources through strip or underground mining to assure the wise use of these resources and prevent the failure to conserve coal. (2)(a) to promote the health and welfare of the people, control erosion and pollution, protect domestic stock and wildlife, preserve agricultural and recreational productivity, save cultural, historic, and aesthetic values, and assure a long-range dependable tax base . . . ."

**Responsible Agency: Department of Environmental Quality**

### **Metal Mine Reclamation**

#### **82-4-301, MCA**

"The extraction of mineral by mining is a basic and essential activity making an important contribution to the economy of the state and the nation. At the same time, proper reclamation of mined land and former exploration areas not brought to mining stage is necessary to prevent undesirable land and surface water conditions detrimental to the general welfare, health, safety, ecology, and property rights of the citizens of the state. Mining and exploration for minerals take place in diverse areas where geological, topographical, climatic, biological, and sociological conditions are significantly different, and reclamation specifications must vary accordingly.

It is not practical to extract minerals or explore for minerals required by our society without disturbing the surface or subsurface of the earth and without producing waste materials, and the very character of many types of mining operations precludes complete restoration of the land to its original condition. The legislature finds that land reclamation as provided in this part will allow exploration for and mining of valuable minerals while adequately providing for the subsequent beneficial use of the lands to be reclaimed."

**Responsible Agency: Department of Environmental Quality**

#### **82-4-302, MCA**

"The purposes of this part are to provide;

- (a) that the usefulness, productivity, and scenic values of all lands and surface waters involved in mining and mining exploration within the boundaries and lawful jurisdiction of the state will receive the greatest reasonable degree of protection and reclamation to beneficial use;
  - (b) authority for cooperation between private and governmental entities in carrying this part into effect;
  - © for the recognition of the recreational and aesthetic values of land as a benefit to the state of Montana; and
  - (d) priorities and values to the aesthetics of our landscape, waters, and ground cover.
- (2) Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish, on a continuing basis, the vegetative cover, soil stability, water condition, and safety condition appropriate to any proposed subsequent use of the area."

**Responsible Agency: Department of Environmental Quality**

**Opencut Mining  
82-4-402, MCA**

"It is the policy of this state to provide for the reclamation and conservation of land subjected to opencut mineral mining. Therefore, it is the purpose of this part to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to safeguard and reclaim through effective means and methods all agricultural, recreational, home, and industrial sites subjected to or which may be affected by opencut mineral mining to protect and perpetuate the taxable value of property, to protect scenic, scientific, historic, or other unique areas, and to promote the health, safety, and general welfare of the people of this state."

**Responsible Agency: Department of Environmental Quality**

**Oil and Gas**

**82-11-101, MCA et seq.**

Though this section primarily deals with which lands are subject to Title 82, it also notes the following objectives: "conservation of oil and gas and the prevention of waste"; "prevent contamination of or damage to surrounding land or underground strata"; "prohibit the waste of oil and/or gas"; "to prevent or to assist in preventing waste of oil"; "to avoid the drilling of unnecessary wells"; and to "protect correlative rights".

**Responsible Agency: Department of Natural Resources and Conservation, Board of Oil and Gas Conservation**

**Water**

**Surface Water Use**

**85-2-101, MCA**

(1). . . the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter.

(2) A purpose of this chapter is to . . . provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights." The intent of the system is to document, protect, preserve, and provide for future water use, and to complete the state water plan.

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation . . . and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities which store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana, for the stabilization of stream flows, and for ground water

recharge.

(4) . . . it is further the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose."

**Responsible Agency: Department of Natural Resources and Conservation**

### **Ground Water Use**

#### **85-2-505, MCA**

"No ground water may be wasted. . . (A)ll wells producing waters which contaminate other waters (must) be plugged or capped. . . . The flow of water (from wells must) be stopped when the water is not being put to beneficial use. . . . (W)ells shall be so constructed and maintained as to prevent the waste, contamination, or pollution of ground water . . ." Some exceptions are noted that would not be considered "waste".

**Responsible Agency: Department of Natural Resources and Conservation**

### **Weather Modification**

#### **85-3-102, MCA**

This section states the purpose of weather modification projects is to minimize danger to health, safety, welfare, or property and allows the Department of Natural Resources and Conservation to develop rules related to controlling such developments or projects.

**Responsible Agency: Department of Natural Resources and Conservation**

### **Irrigation Districts**

#### **85-7-101, MCA**

"(2) Irrigation districts may be formed in order to cooperate with the United States under the federal reclamation laws . . . or under any act of congress which shall permit of the performance by the United States of work . . . for the purposes of construction of irrigation works, . . . or for purchase, extension, operation, or maintenance of constructed works or for the assumption . . . of indebtedness to the United States on account of district lands. . . ."

Related Guidance: Purposes for creation of irrigation districts on adjudicated water supplies (85-7-201) and supplies with rights-in-common (85-7-301) are: "the furtherance of public welfare, and effectiveness in the improvement, development, and maintenance" of certain irrigation systems where administration of them through a water commissioner is not effective.

**Responsible Agency: Department of Natural Resources and Conservation**

### **Dam Safety**

#### **85-15-115, MCA**

The purpose related to this program appears to be to reduce existing and future threats to

property and safety related to dams, and subsequently encourage new dam construction, if such dams are the best solution to water supply problems.

Related Guidance: MCA section 85-15-115 describes the benefits of dams and notes that "the state has a legitimate and compelling interest in encouraging the construction of dams that conform to the water storage policy provided in 85-1-703." The referenced section is from the Water Storage Policy Act, intended to define the role of water storage in solving water management problems and, if water storage projects provide the best solutions to those problems, to facilitate the development of the projects.

**Responsible Agency: Department of Natural Resources and Conservation**

**Wildlife Protection:**

**Licenses (all)**

**87-2-103, MCA**

Licenses are used as a tool to carry out the powers and duties of DFWP, namely "supervis[ing] all the wildlife, fish, game, birds, . . . and game and fur-bearing animals of the state" and making expenditures and enforcing laws related to their "protection, preservation, and propagation."

**Responsible Agency: Department of Fish, Wildlife & Parks**

**Rules and Regulations**

**87-3-101, MCA et seq.**

It is likely the restrictions on the use of reproduced calls, the use of silencers, as well as restrictions on hunting with dogs and hunting from vehicles, aircraft or boats, are intended to maintain a certain level of "sport" in hunting, as well as guard against over harvest. An additional intent is to minimize "waste of fish or game."

**Responsible Agency: Department of Fish, Wildlife & Parks**

**Game Animals**

**87-3-301, MCA et seq.**

In addition to the intent expressed in 87-2-103, MCA staff assumes an other intent is to enhance safety for hunters and the general public. Another intent is to reduce trespass related to hunting.

**Responsible Agency: Department of Fish, Wildlife & Parks**

**Importation, introduction, etc.**

**87-5-501, MCA**

"It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural



existing state except as may be necessary and appropriate after due consideration of all factors involved."

**Responsible Agency: Department of Fish, Wildlife & Parks**

**87-5-701, MCA**

**The purpose is to protect** the native wildlife and plant species, and agricultural production of Montana.

**Responsible Agency: Department of Fish, Wildlife & Parks**

**87-5-701, MCA**

We assume the intent of this section is also to protect native wildlife, as it prohibits importation of salmonid fish or eggs, except under certain conditions.

**Responsible Agency: Department of Fish, Wildlife & Parks**

**Commercial Activities**

**87-4-101, MCA et seq.**

The goal of all commercial licenses is to protect and preserve Montana's wildlife resource through regulations that allow, but monitor and control the sale, possession, and handling of wild animal species for personal profit and economic stimulus. The regulation and licensing of commercial use of captive and privately owned species of wildlife is intended to control the potential introduction and transmission of diseases and parasites, to help prevent the establishment of feral populations which could result in habitat damage or competition with or genetic pollution of native wildlife populations, and to ensure the safety of surrounding landowners when captive animals are shot. The Department administers the following licenses:

87-4-201, Taxidermist's license

87-4-301, Fur Dealer's license

87-4-406, Game Farm license

87-4-501, Shooting Preserve license

87-4-601, Fish Ponds, Seining, and Commercial Taking of Aquatic Fish Food

Organisms

87-4-801, Menagerie and Zoo license

87-4-901, Game Bird Farm license

87-4-1001, Fur Farm license

**Responsible Agency: Department of Fish, Wildlife & Parks**



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## House Bill No. 132

Introduced By knox, mesaros, doherty, grosfield, ryan, orr, brooke

By Request of the Environmental Quality Council

A Bill for an Act entitled: "An Act requiring the departments of environmental quality, agriculture, and natural resources and conservation to report specific compliance and enforcement information to the environmental quality council; and providing an effective date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION.   **Section 1. Reporting requirements.**   (1) The departments of environmental quality, agriculture, and natural resources and conservation shall biennially report to the council the following natural resource and environmental compliance and enforcement information:

(a) the activities and efforts taking place to promote compliance assistance and education;

(b) the size and description of the regulated community and the estimated proportion of that community that is in compliance;

(c) the number, description, method of discovery, and significance of noncompliances, including those noncompliances that are pending; and

(d) a description of how the department has addressed the noncompliances identified in subsection (1)(c) and a list of the noncompliances left unresolved.

(2) When practical, reporting required in subsection (1) should include quantitative trend information.

NEW SECTION.   **Section 2. Codification instruction.**   [Section 1] is

intended to be codified as an integral part of Title 75, chapter 1, part 3,  
and the provisions of Title 75, chapter 1, part 3, apply to [section 1].

NEW SECTION.   **Section 3.   Effective date.**   [This act] is effective July  
1, 1997.

-END-



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